Supreme Court, U. S.
FILED
OCT 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-563

CANADIAN PARKHILL PIPE STRINGING LTD., CANADIAN PARKHILL CONSTRUCTION EQUIPMENT LTD., AND CANADIAN PARKHILL PIPE STRINGING, INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANK O. WETMORE II,
EDWARD J. WENDROW,
Attorneys for Petitioners.

WINSTON & STRAWN,
One First National Plaza,
Chicago, Illinois 60603,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

PAGE

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit 1

Jurisdictional Statement 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 4

Argument 12

1. Due Process 12

2. Alter Ego 18

Conclusion 24

Appendix:

Opinion of Seventh Circuit Court of Appeals (July 23, 1976) A1

Judgment of United States District Court, Southern District of Illinois, Northern Division (June 3, 1975) A13

Master's Report A15

AUTHORITIES CITED.

Alhenius v. Bunn & Humphreys, 358 Ill. 155, 192 N. E. 824 (1934) 22
Arizona State Department of Public Welfare v. Barlow, 80 Ariz. 249, 296 P. 2d 298 (1956) 17
Armstrong v. Manzo, 380 U. S. 545 (1965) 17, 18
Avco Delta Corporation Canada, Ltd. v. U. S., 321 F. Supp. 241 (1971), *aff'd.* 459 F. 2d 436 (1972) 7, 16, 23
484 F. 2d 692 (1973) 8, 10
..... F. 2d ..... (7th Cir., No. 75-1705, July 23, 1976) 12, 13, 14, 22
Brinkerhoff-Faris v. Hill, 281 U. S. 673 (1930) 15
Chandler v. Fretag, 348 U. S. 3 (1954) 17
Flora Construction Co. v. Firemen's Fund Ins. Co., 307 F. 2d 413 (C. A. 10, 1962) 17
Fuentes v. Shevin, 407 U. S. 67 (1972) 18
International Telephone & Telegraph Corp. v. Alexander, 396 F. Supp. 1150 (D. Del. 1975) 15
Laing v. United States and United States v. Hall, 73-1808, 74-75 18
Mathews v. Eldridge, 72-204 (February 24, 1976) 18
Mitchell v. W. T. Grant, 416 U. S. 600 (1974) 18
Moline Properties Inc. v. Commissioner, 319 U. S. 436 (1943) 19, 20, 23
National Carbide Corp. v. Commissioner, 336 U. S. 422 (1949) 19, 20
Powell v. Alabama, 287 U. S. 45 (1932) 17
Prudential Ins. Co. of America v. Small Claims Court, 76 Cal. App. 2d 379, 173 P. 2d 38 (1946) 17

Remole Soil Service, Inc. v. Benson, 68 Ill. App. 2d 234 (1966) 17
Roberts v. Anderson, 66 F. 2d 874 (C. A. 10, 1933) 17
Shaffer v. Below, 278 F. 2d 619 (C. A. 3, 1960) 22
Steven v. Roscoe Turner Aeronautical Corporation, 324 F. 2d 157 (C. A. 7, 1963) 19, 20
Union Savings Association v. Home Owners Aid, Inc., 23 Ohio St. 2d 60, 262 N. E. 2d 558 (1970) 17
United States v. 9.19 Acres of Land, 416 F. 2d 1244 (C. A. 6, 1969) 17

CONSTITUTIONAL AND STATUTORY REFERENCES.

59 Ill. Rev. Stats. § 4 .....4, 21
26 U. S. C. § 6331(a) 2, 3, 6
26 U. S. C. § 6331(b) 2, 3, 4, 6
26 U. S. C. § 6851(a)(1) 18
26 U. S. C. § 7426 7
28 U. S. C. § 1254(1) 2
28 U. S. C. § 1346(e) 7
28 U. S. C. § 1402(c) 7
28 U. S. C. § 2101(c) 2
28 U. S. C. § 2410 7
28 U. S. C. § 2463 7
Fifth Amendment, United States Constitution 2, 3

MISCELLANEOUS.

Stewart on Trial Strategy, 1940 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

CANADIAN PARKHILL PIPE STRINGING LTD., CANADIAN PARKHILL CONSTRUCTION EQUIPMENT LTD., AND CANADIAN PARKHILL PIPE STRINGING, INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners Canadian Parkhill Pipe Stringing Ltd. ("Ltd"), Canadian Parkhill Construction Equipment Ltd. ("Construction") and Canadian Parkhill Pipe Stringing Inc. ("Inc.") respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Southern District of Illinois, Northern Division (Civil Action P-3161, not published). The case in the Seventh Circuit Court of Appeals bears No. 75-1705; the opinion has not yet been published but is reproduced at the Appendix to this Petition. There is also appended hereto a copy of the judgment of the district court and Master's Report which is incorporated by reference therein.

JURISDICTIONAL STATEMENT.

The Petitioners seek review of the judgment of the United States Court of Appeals for the Seventh Circuit rendered on July 23, 1976 affirming the Judgment of the United States district court for the Southern District of Illinois, Northern Division, dated June 3, 1975. The judgment raises significant questions with respect to the repugnance of the ruling of the United States Court of Appeals for the Seventh Circuit and of Section 6331(a) and (b) of the Internal Revenue Code of 1954 (26 U. S. C. 6331(a) and (b)) to the United States Constitution, which questions were raised in the United States District Court for the Southern District of Illinois, Northern Division, and on appeal in the United States Court of Appeals for the Seventh Circuit.

Therefore, this Court has jurisdiction under 28 U. S. C. § 1254(1) and § 2101(c).

QUESTIONS PRESENTED.

1. Whether the seizure by the Internal Revenue Service, without any judicial hearing, of all of the assets of the defendants, resulting in defendants' inability to obtain representation by properly prepared counsel or to pay other expenses of defending themselves and their assets against that seizure and other claims of the United States, constitutes a deprivation of due process under the Fifth Amendment of the United States Constitution.

2. Whether Section 6331(a) and (b) of the Internal Revenue Code authorizing the seizure of property of a taxpayer or others by the Internal Revenue Service without timely judicial hearing is violative of the due process provisions of the Fifth Amendment to the United States Constitution.

3. Have the district court and the Court of Appeals erroneously concluded, from the unopposed evidence presented by the government, that the Parkhill companies are the *alter egos* of each other.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution:

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code 1954, 26 U. S. C. 6331(a) and (b):

6331(a) AUTHORITY OF SECRETARY OR DELEGATE.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any

agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

6331(b) SEIZURE AND SALE OF PROPERTY.—The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

Chapter 59, Section 4, Illinois Revised Statutes:

> "4. Fraudulent conveyances.] § 4. Every gift, grant, conveyance, assignment or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to disturb, delay, hinder or defraud creditors or other persons, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with like intent, shall be void as against such creditors, purchasers and other persons."

STATEMENT OF THE CASE.

The Seventh Circuit Court of Appeals has ruled that there is no denial of constitutional due process where all of the assets of a corporate taxpayer and its two corporate affiliates have been seized and withheld by the unilateral action of the Internal Revenue Service, without judicial hearing, with the result that the corporate taxpayer and its affiliates are stripped and deprived of all means of obtaining effective legal representation in the

subsequent trial of the issues as to their rights as against the United States to the very assets seized.

Canadian Parkhill Pipe Stringing Ltd. ("Ltd") is a Canadian corporation, which, prior to the events here recounted, had been engaged in performance of pipe stringing and laying projects in Canada, and in the ownership of the capital stock of its two wholly-owned subsidiaries, Canadian Parkhill Construction Equipment Ltd., a Canadian corporation ("Construction") and Canadian Parkhill Pipe Stringing Inc., a New York corporation ("Inc"). Inc's business was the performance of pipe stringing and pipe laying projects in the United States. Construction's business was the ownership of pipe stringing and pipe laying equipment which it leased to Ltd and to Inc and to others for the performance of such projects.

All three Parkhill corporations were put out of business in 1970 by the action of the Internal Revenue Service described herein.

The principal executive offices of all three Parkhill corporations were at Toronto, Ontario, Canada. When a project was in progress, a moving field office of the corporation performing that project was maintained near the sight of the project. Payrolls were made up and paid at such field office and supplies were purchased from local bank accounts; payroll and other records in regard the project were kept and withholding tax returns prepared there by field office personnel.

In the summer of 1969 Inc performed a pipe laying project in central and southern Illinois for Natural Gas Pipeline Company. The project was completed at or near Princeton, Illinois in early October. Inc had used equipment of Construction in the project, and after completion the equipment was temporarily stored in a field near Princeton, Illinois.

In early February 1970 the Internal Revenue Service made an assessment *against Inc* for an aggregate of $793,416.73 for withholding taxes (and penalties) on wages allegedly paid on the

Natural Gas Pipeline project during the third and fourth quarters of 1969.* On or about February 17, 1970, the Internal Revenue Service served notices of levy upon all of the assets of Inc, principally accounts receivable from Natural and from one other pipeline owner for which a project had been completed earlier in the year.** On February 17, 1970, without hearing of any kind, the Internal Revenue Service, purportedly acting pursuant to the authority of Section 6331(a) and (b) of the Internal Revenue Code, but without prior demand upon Ltd or Construction, seized all of the pipe laying equipment at Princeton, Illinois.

The Internal Revenue Service thereafter steadfastly refused all demands of Construction and Ltd that the equipment be released, and only upon being convinced that its value was depreciating by exposure to the elements did the Internal Revenue Service finally consent to the sale of the equipment and deposit of the proceeds in escrow with The Northern Trust Company, Chicago, to preserve the value. The escrow agreement was signed on or about May 26, 1970. It preserved

* There is substantial dispute as to the amount of this tax liability. Inc contends that large portions of the "wages" shown on the Forms 941 prepared by field office employees and filed on behalf of Inc for these periods and on which the assessment is based, were in fact embezzlements by unfaithful field employees of Inc, on which no withholding tax would be due, and that Inc is entitled to a set-off for "withholding" actually paid to the government on prior embezzlements of the same nature. Counsel for the Parkhill companies have presented substantial evidence of such embezzlements to the Department of Justice and demanded action to discover further facts. To date the Justice Department has reported that neither it nor the Internal Revenue Service has taken any action against the alleged embezzlers and have refused to state why. The alleged embezzlers were among the government's principal witnesses at the "trial" conducted in the district court.

** Also a double jointing rack located at Poteau, Oklahoma, the approximately $160,000 proceeds of the sale of which were ultimately divided equally between the United States and CRC Crose International, an alleged chattel mortgagee, pursuant to agreement between the United States and CRC Crose and an order of the United States District Court, Tulsa, Oklahoma, to which the Parkhill companies took exception.

all the rights of the parties, and transferred them from the equipment to the proceeds. On July 16, 1970 the equipment was sold at public auction at Princeton, Illinois for in excess of $1,100,000.

Litigation ensued in the United States District Court for the Southern District of Illinois, Northern Division (Peoria, Illinois). That Court's jurisdiction and venue were based upon 26 U. S. C. § 7426, 28 U. S. C. 1346(e), § 2410 and § 2463, and 28 U. S. C. 1402(c). The initial phases of that suit involved a contest between the United States and a chattel mortgagee of certain of the equipment. That resulted in the payment from the escrow of $556,000 to Avco Delta Corporation Canada, Ltd., the chattel mortgagee, pursuant to the order of the United States District Court for the Southern District of Illinois, Northern Division, *Avco Delta Corporation Canada, Ltd.* v. *U. S.*, 321 F. Supp. 241 (1971), affirmed the Seventh Circuit Court of Appeals, 459 F. 2d 436 (1972).

After payment of the costs of the auction sale and several minor transactions as to which the Internal Revenue Service and other parties were able to agree, there remained in the escrow approximately $600,000 principal, which has, through investment in U. S. Treasury Bills, since grown to approximately $770,000 as of June of 1976.

The payment of the $556,000 to Avco Delta Corporation Canada, Ltd., left a deficiency owing upon Construction's obligation to Avco Delta Corporation Canada, Ltd. That debt had been guaranteed by Ltd and the payment of that balance and interest, plus payment of approximately $18,000 for expenses and fees of counsel at Tulsa, Oklahoma, Peoria, Illinois and Chicago, Illinois in the early stages of this litigation left the Parkhill companies in the following financial circumstances:

Inc: Had $205,000 receivable from Natural which had been paid into court in this case, largely through efforts of counsel for the Parkhill companies. Inc contended that this was payable

to the Internal Revenue Service, as subject to its notices of levy of February 17, 1970. The Seventh Circuit ruled (484 F. 2d 692) that the Internal Revenue Service must share it pro rata with other claimants (Opinion, August 1, 1973) and has now affirmed the district court's award of that fund approximately $143,000 to the government and $62,000 to other claimants on the Natural project. Inc had no interest in that fund other than to seek to have it applied to its withholding tax obligation. Inc has no other assets.

Construction: Claims the $600,000, plus interest, proceeds of the sale of its equipment deposited in escrow at Northern Trust Company, Chicago and of which the United States refuses to release any portion. Construction has no other assets.

Ltd: Owns the stock of Inc and Construction, owned its office furniture (worth less than $1,500) and a ten-acre gravel pit at North Bay, Ontario appraised at from $300 to $500, both of which assets have been sold and the proceeds applied to obligations of Ltd.

Construction and Ltd introduced into this record in November of 1971 as exhibits to a motion for partial summary judgment, uncontradicted evidence establishing that there can be no question but that a great majority of the equipment of which the escrow fund is the proceeds, had been the property of Ltd and then Construction for many years prior to the accrual of the alleged tax liability of Inc for which the Internal Revenue Service seized those assets.*

In April of 1972, more than two years after the initial seizure of the equipment, the United States filed its Amended Answer and Cross Claim herein to claim for the first time that it was entitled to its seizure of the equipment because each Ltd and

* Construction contends that with minor and insignificant exceptions, *all* of the equipment belonged to it. The motion for partial summary judgment covered only those items as to which the documentation then available precluded the raising of any "genuine issue as to any material fact" regarding that ownership.

Construction and Inc. was the alleged alter ego of the other. The United States had assiduously avoided any such contention during the pendency during the previous two years of its disputes with Avco Delta Corporation Canada Ltd., chattel mortgagee of a portion of the equipment, as such a contention then would have summarily defeated the United States' position taken in that litigation. (Additional interest costs to the Parkhill companies of over $100,000 resulted from the time consumed in resolving that dispute between the government and the chattel mortgagee.) Faced with the motion for summary judgment, however, the Amended Answer and Cross Claim was apparently seen as the only way the United States could raise a question of fact as to which party was entitled to the proceeds of the equipment.

The United States has therefore seized equipment, a substantial majority (if not all) of which it admits to be the property of Construction or Ltd. and has sought to apply it to taxes allegedly owing by Inc. It seeks to justify that action upon the allegation made by an attorney of the Justice Department on information and belief in an amendment to a pleading filed over two years after the seizure, that the attorney believed that there was an alter ego relationship among the three Parkhill companies. In this instance that equipment (or now its proceeds) happened to be *all* of the assets of Construction and (through it) Ltd.

The United States contended that there was no denial of constitutional due process where, based upon the unilateral action of some anonymous tax collector in issuing a seizure order in 1970 and upon the allegation of an attorney in the Justice Department two years later that he believed the Parkhill companies may have had an alter ego relationship, Construction and Ltd. were deprived of *all* of their assets by seizure, and denied access to those assets to defend against the action of the United States in seizing them.

In September 1972, the district court held that the denial to the defendants of access to that fund to defend themselves would constitute a denial of due process. The district court ordered the release of $60,000 of the fund to the defendants to employ counsel and defray expenses of defense against the United States' action. The government appealed.

The Seventh Circuit ruled that it could not be determined until after a "trial" whether the Parkhill companies or any of them had been or would be denied a constitutional right (484 F. 2d 692). The case was remanded to the district court for a "trial" at which the Parkhill companies would not be represented by counsel—or if counsel was present at the trial by order of the district court, that counsel would in any event be unprepared, having been denied funds with which to conduct the extensive discovery necessary to defend this suit.

The Seventh Circuit implied doubt at that time as to the possibility of these corporations receiving a fair trial in the circumstances (484 F. 2d 692, 707), but in accordance with its own prior ruling referred to in its opinion has insisted that the fact be demonstrated at a "trial".

Following that decision, the Parkhill companies filed a Petition for Certiorari in this Court which was denied on February 19, 1974.

The case was remanded to the district court where it was set for trial in the fall of 1974.

The matter was referred by the district court to a special master to hear evidence and report. The master conducted hearings on November 20, 21 and 27, 1974, at which the government introduced over 1,560 pieces of documentary evidence and the testimony of six witnesses, and at which counsel for parties other than the Parkhill companies presented limited evidence not material to this appeal.

Parkhill companies did not appear by counsel or otherwise at those hearings, Parkhill counsel stating that in the absence

of proper discovery preparation he could not render meaningful assistance to the Parkhill companies.

The special master filed his report on April 21, 1975 in which he described the proceedings as "less than full adversary hearings" (A18)* due to the absence of representation of the Parkhill defendants. The master described that portion of his report relating to tax matters as "little more than a rationalization and summary of the evidence presented by the Government" (A18). His finding was that the government was entitled to over $2 million in taxes, interest and penalties and that the Parkhill companies were the alter egos of each other.

The special master's report was submitted to the district court and objections to the report were heard on behalf of the United States and the Parkhill companies. Parkhill companies' objections were that they had been denied due process in having been denied their own funds for use in preparation for the trial and that in any event the evidence presented by the government did not support the conclusions of the special master.

On June 3, 1975, the district court affirmed and adopted the master's findings in all respects and entered a finding and conclusion that the Parkhill companies had not been denied due process. The court ordered the proceeds of the equipment held in escrow by The Northern Trust Company to be paid to the government.

Appeal was taken by the Parkhill companies to the Seventh Circuit Court of Appeals on the ground that (a) they had been denied due process through the denial of an opportunity to appear at the hearing by adequately prepared counsel to oppose the government's case, and (b) in any event the evidence presented by the government did not sustain its contention that the Parkhill companies were the alter egos of each other.

The Seventh Circuit Court of Appeals affirmed the judgment of the district court. A copy of that opinion is appended hereto at pages A1 through A12, and this Petition for Writ of Certiorari has followed.

---

* Reference to Appendix to this Petition.

A copy of the Order of the district court is appended at pages A13 and A14, and the Master's Report is appended at pages A15 through A43.

ARGUMENT.

1. Due Process.

In a footnote at page 8 of its slip opinion (A8), the Seventh Circuit Court of Appeals comments that,

> "The prime emphasis, it appears to us, in the due process context is whether there is an opportunity for a *fair* hearing." (Emphasis added.)

We agree.

In the text of its opinion at page 8 (A7), the court stated that

> "Inherent in the prematurity holding [prior opinion, 484 F.2d 692, 706] was the contemplation that a trial would be held at which the defendants would make all reasonable efforts to defend. The Parkhill companies did nothing to protect their rights at that hearing."

and at page 9 of the slip opinion (A9), the court states,

> "We will have to have it demonstrated to us, however, that if competent counsel . . . participates in a hearing, even though complex facts are involved, he cannot by dint of cross-examination and objection demonstrate the frailties of the efforts of the party having the burden of proof, here the Government."

Clearly Parkhill counsel might have objected to leading questions which government counsel was prone to use, but proper cross-examination of witnesses requires extensive pretrial discovery and study of the evidence offered. The basic tenet of cross-examination is, "If you do not know what the answer will be, be sure that you are in a position to refute an unfavorable answer" (Stewart on Trial Strategy, 1940, p. 228). Without such preparation it was impossible for Parkhill counsel to conduct effective cross-examination or furnish meaningful representation to the Parkhill companies.

They would further have been denied due process, though counsel had appeared, through their lack of ability to prepare and present evidence in rebuttal to the voluminous documentary evidence and testimony offered by the government. Intelligent objections to the more than 1,560 pieces of documentary evidence presented by the government would have required extended study and interviews all over the country.

Nevertheless, the Court of Appeals concluded that the Parkhill companies had been afforded the opportunity for a hearing and had waived it through their counsel's having declined to participate in that hearing. But what of the requirement of a *fair* hearing? Does the Seventh Circuit ruling mean that representation by counsel totally unprepared and unable to present rebuttal evidence is a "fair" hearing? That cannot be; and that being the case, it makes no difference whether unprepared counsel attends the "hearing" or not. The client is denied a fair hearing in either event—and is therefore denied due process.

At the "hearing" before the master the government offered and had admitted over 1,560 separate pieces of documentary evidence. The government presented the testimony of six witnesses covering 282 pages of transcript. Parkhill counsel had prior knowledge of the existence of a minute portion of the documentary evidence but no way of knowing that any of it would or would not be offered.

Similarly though counsel might have surmised that the revenue agents would testify and that the unfaithful employees of Inc, Leonard and Baun, the alleged embezzlers, might testify, he had no opportunity through pretrial discovery to anticipate the content of any of the exhibits or testimony, let alone to prepare rebuttal testimony or exhibits thereto.

The Seventh Circuit states

> "Here, no doubt, it was deemed that the picture of lack of fairness of proceedings, or lack of due process, would be more explicit and dramatic if there was no participation whatsoever." (A8)

The Parkhill companies and their counsel were faced with a situation in which they were damned if they did and damned if they didn't. One could as readily imagine an opinion of the Court of Appeals, had Parkhill counsel appeared at the hearing, that the Parkhill companies *were* represented by counsel at the hearings before the special master, notwithstanding their inability to afford as full discovery procedures as counsel might have preferred; that no litigant can afford unlimited discovery, and that it is, after all, a matter of degree, and that therefore the requirements of due process have been met.

The Court of Appeals say the Parkhill companies waived the right to a hearing by not appearing. Had counsel appeared it could as readily be said that the Parkhill companies waived the due process objection. Counsel is blamed with having taken the wrong path at a fork in the road where both paths lead over the same distance to the identical destination.

At page 7 of its opinion (A6), the Court of Appeals states,

> "we note that none of the cases [cited by Parkhill counsel] indicates that an *indigent corporation* has a right to counsel compensated by the Government in a civil case." (Emphasis added.)

One would imply that the funds of the Parkhill companies, when seized by the government, *ipso facto*, became the property of the government, and that their subsequent release for financing of their own defense would have constituted payment by the government of counsel for an indigent corporation. The implication anticipates the result sought by the government.

But in fact these corporations were not indigent corporations. Construction, and through it Ltd owns over $770,000, being the remainder of proceeds (plus interest earned) of equipment seized by the government. The government has refused to relinquish any portion of the proceeds of that equipment, the great majority of which has been conclusively shown in this record (R. 986-1154) and acknowledged by the testimony of revenue

agent McVarish to be "the legitimate one hundred percent items owned by Limited" (T. 202).

The income tax assessments were the result of unilateral judgments made by a single revenue agent of some nine years' experience who had examined no more than 175 tax returns in his career. Based upon what that one agent "felt," after examining whatever records *he alone* though were relevant, hundreds of thousands of dollars of tax deficiencies and penalties were assessed. The taxpayer's and its affiliated corporations' assets were seized and by that seizure they were rendered incapable of defending against the seizure itself or the tax assessment. There was and there has been no opportunity for hearing of any meaningful kind. The Parkhill companies have been denied the ability to defend.

A taxpayer (let alone a party whose assets have been seized for the alleged tax obligation of another) "must be afforded an opportunity to be heard when the revenue authority proceeds to assess and collect taxes from him." *International Telephone & Telegraph Corp.* v. *Alexander*, 396 F. Supp. 1150, 1164 (D. Del. 1975). In *Brinkerhoff-Faris* v. *Hill*, 281 U. S. 673, 682 (1930), Mr. Justice Brandeis wrote:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

The principle is equally applicable to the constitutional constraints upon activities of the Internal Revenue Service, and the Parkhill companies have been afforded no opportunity to protect their rights in the property seized.

And in seizing the property of Construction and Ltd the revenue agent was not even all that certain of his basis for doing so. When asked (improperly) by government counsel at the hearing before the Special Master for his *conclusion* as to whether the Parkhill companies "operate as one corporation

or were they separate entities" (T. 218), revenue agent McVarish answered,

> "It's not a black and white thing, naturally, but I would consider them to be one company basically." (T. 219)

On that equivocal opinion of one revenue agent, over $1,000,000 worth of equipment was seized. The increased interest cost alone because of the delay in obtaining the release of the proceeds of the mortgaged equipment to Avco Delta, the mortgagee, (459 F. 2d 436) was over $100,000.

While revenue agent McVarish was willing to ignore the technical formalities of the separate corporate entities of Inc, Ltd and Construction to favor the Government, neither he nor government counsel was so disposed when the shoe was on the other foot.

The revenue agent acknowledged that he was aware of the net operating loss of $1,843,000 reported in the 1969 return of Inc (T. 214) and acknowledged that Inc would have the right to carry back that loss and completely wipe out the income tax deficiencies he had assessed for prior years (assuming, arguendo, that those deficiencies were correct). But Mr. McVarish testified that the 1969 return was not "probative in this case" (T. 214) because no formal claim for refund or carry back had been made.

The funds with which the Parkhill companies might have hired accountants to prepare such a refund claim had been seized and withheld by the government. Part of the records of the corporations had been withheld by government witnesses Leonard and Baum (former field office employees of Inc, suspected of extensive payroll embezzlements).

The question is not whether the government must pay for the defense of these corporations but whether the government by seizing the assets of those corporations may prevent them from defending themselves.

A corporation may not defend suits in the courts except through licensed attorneys. *Remole Soil Service, Inc.* v. *Benson,* 68 Ill. App. 2d 234 (1966); *Flora Construction Co.* v. *Firemen's Fund Ins. Co.,* 307 F. 2d 413 (C. A. 10, 1962); *United States* v. *9.19 Acres of Land,* 416 F. 2d 1244 (C. A. 6, 1969). This is true even of an "indigent" corporation. *The Union Savings Association* v. *Home Owners Aid, Inc.,* 23 Ohio St. 2d 60, 262 N. E. 2d 558, 560 (1970).

"A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean,* 234 U. S. 385, 394 (1914). It is an opportunity which must *be granted at a meaningful time* and in a meaningful manner," *i.e.,* by counsel with adequate pretrial preparation. (Emphasis added.) *Armstrong* v. *Manzo,* 380 U. S. 545, 552 (1965). The right to a hearing includes the right to appear by counsel. *Chandler* v. *Fretag,* 348 U. S. 3, 9, 10 (1954). This right exists, not only in criminal cases, but in civil cases as well. *Powell* v. *Alabama,* 287 U. S. 45, 68, 69 (1932); *Roberts* v. *Anderson,* 66 F. 2d 874 (C. A. 10, 1933); *Prudential Ins. Co. of America* v. *Small Claims Court,* 76 Cal. App. 2d 379, 173 P. 2d 38, 39 (1946); *Arizona State Department of Public Welfare* v. *Barlow,* 80 Ariz. 249, 296 P. 2d 298 (1956).

Thus, in the *Powell* case, as long ago as 1932, this Court said (pp. 68-69):

> "What, then, does a hearing include? Historically and in practice, in our own country, at least, it has included the right to the aid of counsel when desired and provided by the party asserting the right * * * If in any case, civil or criminal, a state or federal court will arbitrarily refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

In a number of recent decisions this Court has upheld the principle that due process requires the opportunity for a mean-

ingful and timely hearing when a party is to be deprived of property rights. See, *Fuentes* v. *Shevin*, 407 U. S. 67, 91 (1972); *Mitchell* v. *W. T. Grant*, 416 U. S. 600 (1974); and Mr. Justice Brennan's concurring opinion in *Laing* v. *United States* and *United States* v. *Hall*, 73-1808, 74-75, entered January 13, 1976. He expressed the opinion that the jeopardy assessment provisions of the Internal Revenue Code, Section 6851(a)(1), fall short of meeting the due process requirement notwithstanding the requirement for a hearing after sixty days, that sixty-day delay being too long to accommodate the constitutional right. In the present case the parties whose assets have been seized have been denied any meaningful hearing for over six years.

In *Mathews* v. *Eldridge*, 72-204, in its opinion entered February 24, 1976, this Court reaffirmed the holding of *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965), that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

Though the Parkhill companies have ostensibly been given the opportunity for a hearing (somewhat more than four and one-half years after the initial seizure), that "hearing" has not been "meaningful." The government has rendered the Parkhill companies incapable of defending themselves in that hearing through the unilateral seizure of all of their assets.

The Court of Appeals held that the Parkhill companies did nothing to protect their rights at the hearing. In fact they could do nothing and as a result have been denied the opportunity for the fair hearing which the Seventh Circuit itself cites as the prime emphasis in the due process context.

2. Alter Ego.

The Court of Appeals affirmed the ruling of the district court in which it held that the Parkhill companies were the alter egos of each other stating that "findings were made from which the

special master could properly conclude that sufficient wrong had been committed for the corporate entities to be ignored" (A11). Therefore the assets of Ltd and Construction (apparently acknowledged to be their separate property) were held to be available to the government for the satisfaction of the alleged tax liability of Inc.

The Court of Appeals recognized the separateness of the individual Parkhill corporations in accordance with this Court's holdings in *Moline Properties Inc.* v. *Commissioner*, 319 U. S. 436 (1943), and *National Carbide Corp.* v. *Commissioner*, 336 U. S. 422 (1949), but ruled that though the distinct business purposes of the Parkhill companies insulate each from assessment of the taxes of the others, the Internal Revenue Service is still entitled to collect taxes owing by Inc from Ltd and Construction in its capacity as creditor of Inc. In support of that conclusion, the Court of Appeals cites its prior ruling in *Steven* v. *Roscoe Turner Aeronautical Corporation*, 324 F. 2d 157 (CA 7, 1963). It should be noted, however, that that case does not support the conclusion reached in view of the facts found by the district court and the record in this case.

In *Steven* v. *Roscoe Turner Aeronautical*, the court ruled that there was not an alter ego relationship between the corporations there involved.

The Seventh Circuit's opinion in this case (A11), recites a number of indicia upon which the district court relied for its finding of alter ego, among them stock control and common officers and common directors.

Steven v. *Roscoe Turner Aeronautical Corporation*, at page 161, holds that such factors are common business practice and exist in most parent and subsidiary relationships and are not of themselves sufficient to bring "the rule" into operation. The same is true of other factors cited by the Court of Appeals, namely, sharing of offices and mailing address, telephone number, accounting services *i.e.* the same public accountants audited the books of all three companies.

In *National Carbide Corp.* v. *Commissioner*, 336 U. S. 422 (1949) at p. 433, this Court said:

> "Undoubtedly the great majority of corporations owned by sole stockholders are "dummies" in the sense that their policies and day-to-day activities are determined not as decisions of the corporation but by their owners acting individually. We can see no significance, therefore, in findings of fact such as, "The Airco board held regular meetings and exercised complete domination and control over the business of Airco and each of the petitioners," and "The chairman, vice chairman, and president of Airco were in charge of the administration and management of the activities of each petitioner and carried out the policies and directives with respect to each petitioner as promulgated by the Airco board." (Footnote omitted.)

There is no suggestion in the *Steven* v. *Roscoe Turner Aeronautical* case that it stands for the distinction made in the Court of Appeals' opinion between liability for assessment of taxes and liability for collection of taxes. This is a distinction without a difference and is not seemingly consistent with this Court's holding at pages 438-439 of *Moline Properties* that,

> "The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity." (Footnotes omitted.)

The denial of the Parkhill companies of an opportunity to be heard in rebuttal of the evidence offered by the government has again destroyed their ability to defend themselves in this respect, but it should be noted that even from the evidence presented by the government it is apparent each of the Parkhill companies had their own separate corporate books and records, had separate fields of business activity, filed separate tax returns and were

separately audited. Further the holding (A11) that the three had the same employees is clearly erroneous. Though there were certain employees who were common to all three, Inc had hundreds of employees who were not employees of either Ltd or Construction. Again though business in the United States performed by Inc had occupied 100% of the capacity of the three companies in 1969, it is acknowledged that Ltd had performed projects in Canada in earlier years and that Construction was formed for the purpose of owning and leasing the construction equipment.

Ltd and Construction not being liable for the taxes of Inc, as such, the only way they may be held liable therefore would be through fraud or wrong by the parent through its subsidiary. The government had charged that assets of Inc were transferred fraudulently to Ltd or Construction through the exercise by Ltd or Construction of options to purchase equipment originally leased by Inc.

A conclusion that a transfer was made in fraud of creditors requires findings as to (a) the transfer, (b) the value of the asset transferred, (c) the amount of consideration for the transfer, from which it must appear that the consideration was inadequate, and (d) that the transfer was "made with the intent to disturb, delay, hinder or defraud creditors" (Ch. 59 § 4, Ill. Rev. Stats.).

The special master (whose findings and conclusions are adopted by the district court) could not properly reach any such conclusion for many reasons. He had before him no evidence as to the *value* of any of the equipment at the times that options were exercised by Ltd or Construction. Nor did he in many instances have any evidence of a transfer. He based his "conclusion" apparently upon the testimony of agent McVarish who had testified that certain of the equipment had been transferred for inadequate consideration, based on the "book value," *i.e.*, cost less accumulated depreciation (T. 202) of that equipment.

"Book value" clearly cannot be relied upon as representing the "value" of the equipment in determining whether or not it was "transferred" (if it was) for a fair value. *Shaffer* v. *Below*, 278 F. 2d 619, 625 (CA 3, 1960); *Alhenius* v. *Bunn & Humphreys*, 358 Ill. 155, 169, 192 N. E. 824, 830 (1934). And no effort was made in the Master's Report to show the charges and credits reflected on the books of the Parkhill companies for those transfers.

In its opinion (A12), the Court of Appeals states that equipment transferred on a bill of sale of October 15, 1969 "included equipment purchased by Inc which had a market value in excess of $900,000" apparently based on agent McVarish's testimony as to book value. That equipment sold for $569,925 at the public auction in July of 1970.* Ltd was charged $1,016,926 (the original purchase price) for this equipment on the inter-company accounts between Ltd and Inc, in the year end entries for the fiscal year ended Sept. 30, 1969.

No showing was made that McVarish had any knowledge as to the *value* of such equipment or that he had any information as to the condition of the equipment at the times of the allegedly fraudulent transfers.

As to 1968 project year equipment, the options were exercised after the September 30 close of the fiscal years of Ltd and Construction. The charges against Construction and Ltd on account of values of this equipment would have therefore been in the fiscal year ended September 30, 1969. The 1968 charges to which McVarish objected were reversed in 1969 (Gov. Ex. 3, pp. 51, 84). It has been impossible to complete the accounting records of these companies for that year due to the refusal of government witnesses Leonard and Baun to turn over records pertaining to the 1969 operations (Parkhill Court of Appeals Brief, Appendix pp. A-3, A-4; Gov. Ex. 3, pp. 28, 57, 118).

* $160,000 of this represents the proceeds of the double jointing rack which was sold subsequent to the public auction.

The government made no attempt whatsoever to prove intent to defraud creditors. The government argues that the bills of sale required by Avco Delta as evidence of title in connection with its loan to Construction in November 1969 were transfers at that time rather than confirmation of long-standing policy and practice. The Court of Appeals long ago recognized that Avco Delta required those bills of sale to confirm title to the property in the name of its mortgagor (459 F. 2d 436, 440) in connection with that loan (Gov. Ex. 3, pp. 77-78, 114-115). By government witness Leonard's testimony, the purpose of that borrowing was to raise funds to be advanced to Inc to be used in paying Inc's debts incurred in the course of the 1969 project for Natural Gas Pipeline Company (T. 160-161). Therefore even assuming, arguendo, that the government's contention is correct and that those bills of sale represent transfers that took place in November of 1969, it is clear that their purpose was not "to disturb, delay, hinder or defraud creditors," the requisite language of the applicable statute. The purpose of those transfers was undeniably to raise funds with which to pay creditors of Inc. Government witness Leonard so testified.

The master's conclusion, adopted by the district court and apparently affirmed by the Court of Appeals that,

> "a gross injustice would be done if the three Parkhill companies were not treated as one entity."

is not based upon any specific findings of fact and is therefore clearly erroneous. The mere nonpayment of the creditor of one corporation and the retention of assets by another is the result in all cases in which the separateness of corporate entities are recognized. That is, after all, one of the acknowledged and legitimate purposes of the creation of separate corporations *Moline Properties, Inc.* v. *Commissioner of Internal Revenue*, 319 U. S. 436 (1943) and those purposes may only be defeated upon the showing of specific facts constituting a fraud which the government has failed, in unopposed hearings, to do.

CONCLUSION.

The Parkhill companies have been denied constitutional due process in being stripped by the government of all ability to defend and thereafter forced to trial on the issue of the government's claim to the assets seized. But even without any opportunity to the Parkhill companies to defend, the government has failed to sustain its burden of proof of its allegations that the Parkhill companies are the alter egos of each other. The trial court's findings in that respect are clearly erroneous, lacking support by any evidence as to facts essential to sustain such a claim.

The Parkhill companies respectfully request this Court issue a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals entered herein on July 23, 1976.

Respectfully submitted,

FRANK O. WETMORE II,
EDWARD J. WENDROW,
Attorneys for Petitioners.

WINSTON & STRAWN,
One First National Plaza,
Chicago, Illinois 60603,
Of Counsel.

APPENDIX.

OPINION OF SEVENTH CIRCUIT COURT OF APPEALS 75-1705

Decided July 23, 1976.

PELL, *Circuit Judge.* Two issues are presented for review on this appeal: first, whether the Parkhill Companies[1] were denied due process of law in a trial, and second, whether the district court erred in sustaining the Government's contention that the assets of all three companies could be used to satisfy the tax liabilities of one company.

Canadian Parkhill Pipe Stringing, Ltd. (LTD) is a Canadian corporation formed in about 1951 which has engaged in the business of "stringing" and laying gas pipe lines in Canada. Canadian Parkhill Pipe Stringing, Inc. (INC), also known as Parkhill Pipeline Inc. as a result of a name change, is a New York corporation formed in 1962. It is a wholly owned subsidiary of LTD and was formed for the purpose of carrying out pipe laying and related projects in the United States. Canadian Parkhill Construction Equipment, Ltd. (CONSTRUCTION) is a Canadian corporation formed in 1967. It is also a wholly owned subsidiary of LTD and was formed for the purpose of owning and leasing pipe stringing and laying equipment. In 1967 the equipment owned by LTD was tranferred to CONSTRUCTION in keeping with a policy that all equipment would be owned by CONSTRUCTION and leased to the other companies as well as to non-affiliated companies. INC rented equipment from dealers in addition to renting from CONSTRUCTION. Typically the rental agreements with dealers would contain an option to purchase, and if such an option was exercised, it would be exercised by CONSTRUCTION. The

1. Canadian Parkhill Pipe Stringing, Ltd.; Canadian Parkhill Construction Equipment, Ltd.; and Canadian Parkhill Pipe Stringing, Inc.

purpose of this policy, according to Parkhill's brief, was to take advantage of certain Canadian tax laws permitting expensing rather than capitalizing-depreciating the amounts involved in the purchases.

H. B. Sceats was at all material times the president of the Parkhill companies and owned seventy percent of the stock of LTD. The remaining thirty percent was owned by Richard Leonard, the vice-president. Sceats' office was in Toronto, Canada, all three Parkhill companies sharing office space, staff, and equipment and having the same address in Toronto, although only LTD's name was on the door. Leonard was in charge of the field operations of the companies and regularly had his office in a field trailer at a project site.

As a result of losses incurred on a pipe laying project for Natural Gas Pipeline Company in Illinois, INC was unable to pay the third quarter withholding on wages reported for that period. When Sceats sought further information from the field offices on the amount of these losses, Leonard would not allow access to field office records, apparently due to a dispute between them over control of the company.

For the purpose of raising funds with which to pay the withholding taxes, $600,000 was borrowed from Avco Delta Corporation Limited (Avco Delta). This loan was secured by a chattel mortgage executed by CONSTRUCTION, which company was also listed as debtor on the financing statement. The security on the mortgage was 29 pieces of heavy construction equipment. While CONSTRUCTION covenanted that it was the owner of the equipment, LTD and INC executed a guarantee and indemnity agreement wherein they agreed to guarantee payment as principal debtors of debts and liabilities of CONSTRUCTION to Avco Delta as well as indemnifying that company as to any losses resulting from the transaction. Nevertheless, the taxes were not paid because the proceeds of the loan were deposited in the Royal Bank of Toronto, which institution forthwith set off the money against a guarantee of an obligation of LTD

to the bank for previous borrowings, the proceeds of which had been advanced to INC by LTD as a loan for the Natural Gas Pipeline job.

In February of 1970 the Internal Revenue Service seized all of the equipment which had been used by INC on the Natural Gas Pipeline job. It also seized other items located elsewhere in the United States. It served notices of levy upon Natural Gas Pipeline Company on the retainage it held on the Illinois project. Other levies made are not involved in this appeal. Pursuant to an agreement among the parties, the equipment was sold and the proceeds were placed in escrow.

Litigation emanating from that project has been before this court twice previously. The first instance arose from the suit of Avco Delta against the United States and the Parkhill companies in an endeavor to establish priority of the mortgagee's claim over that of the Government. Avco Delta prevailed in the district court with the judgment being affirmed here. 459 F. 2d 436 (1972). Avco Delta is no longer an active participant in the litigation. The sale of the mortgaged equipment, however, produced an excess of some $600,000 over the amount needed to pay off Avco Delta and that excess amount is involved in the present appeal.

The Parkhill companies urged that they would be denied due process of law in a trial if the funds levied upon by the United States were not released for their use to pay counsel and prepare their case because their other funds had been exhausted.[2] The district court in advance or trial ordered funds released. The second appeal in part involved this issue. This court reversed, 484 F. 2d 692, 707 (7th Cir. 1973), *cert. denied*, 415 U. S. 931 (1974), holding:

> The contention that the Government's actions will cause an unfair trial in the future is . . . capable of determination only after that trial takes place.

2. The record is unclear regarding the availability of assets in Canada. The Parkhill counsel seems to indicate that there are none, but the Government indicates that there is no evidence showing this.

> .... The Government should be on notice, however, that we will carefully scrutinize any further appeals to see if in fact Parkhill has been denied due process of law by a constitutionally violative over-reaching by the Internal Revenue Service. [Footnote omitted.]

This court remanded the case for proceedings not inconsistent with its opinion.

On remand, the district court appointed a practicing attorney as a special master to hear the remaining issues of the case, including the issues of the amount of tax liability and whether the assets of LTD and CONSTRUCTION could be used to satisfy the liabilities of INC.

Before the hearing the Government sought to require discovery and to require the presence of Sceats for that purpose in Illinois. That discovery was refused by the Parkhill companies on the grounds, inter alia, that the Government previously had access to all Parkhill records, that there had been suggestion of criminal proceedings against Sceats about which Government counsel had refused to answer any questions, and that Parkhill counsel suspected that the requested presence was a ruse to entice Sceats into the United States so that he could be arrested and held on criminal charges. During the time prior to the special master's hearing, counsel who had been regularly representing the Parkhill companies in this litigation, being the same counsel representing the companies on this appeal, participated in matters before the district court. The appearances included the filing of written objections to the Government's efforts to secure discovery.

Subsequently the Government moved for a default judgment against the Parkhill companies for failure to comply with the discovery requests. A response to this motion was filed on behalf of the companies. The district court, noting the time that had elapsed since the institution of litigation during which discovery could have been accomplished and also adverting to this court's caution against overreaching conduct on the part of the Government, denied the motion for default judgment.

The hearings before the special master commenced on November 20, 1974, and continued on the following day and November 27 resulting in a 283-page transcript. The Parkhill companies' counsel declined to participate in this hearing in any way. Nevertheless, the special master sua sponte did inquire into some of the Parkhill charges concerning claimed embezzlements. On April 21, 1975, the special master filed a detailed 33 page report[3] setting forth his findings of fact and conclusions of law, but noting that the proceedings were somewhat less than full adversary hearings as a result of the failure of the Parkhill companies to participate in them. He also observed that consequently "this portion of my report [pertaining to tax liability] can be little more than a rationalization and summary of the evidence presented by the Government."

The report stated that the Government had presented convincing proof of its charge that the Parkhill companies should be treated as one entity and that CONSTRUCTION and LTD should be liable for the debts of INC. The special master found that the Parkhill companies had failed to meet their burden of proof to overcome the Government's presumption of correctness regarding the taxes assessed and held that civil fraud penalties were properly assessed. He made meticulous findings regarding the various deficiencies alleged and concluded that the Parkhill companies owed taxes, interest and penalties incurred by INC of $2,470,233.98 plus interest and penalties accruing after September 23, 1974. The taxes included income tax deficiencies for 1967 and 1968 and withholding and FICA taxes for the third and fourth quarters of 1969. In accord with this court's earlier holding, the master found that certain counterdefendants had valid claims against the retainage from the Natural Gas Pipeline Company job in Illinois. See 484 F. 2d at 705. He ruled that after their claims were satisfied, the balance of the retainage

3. We entertain no feeling that literal length is necessarily equated with figurative depth. Here, however, our examination of the special master's report does indicate the existence of the equation.

fund, approximately $143,000, should be paid to the Government. He also held that the Government was entitled to the proceeds remaining from the sales fund, approximately $600,000.

Counsel for the Parkhill companies again entered the litigation and filed extensive and specific objections to the special master's report. The Government also filed objections to the report particularly with respect to the master's finding that the Government had presented no satisfactory evidence as to the precise amount of employment taxes on the Natural Gas Pipeline project. The district court after consideration of the objections and after hearing oral argument concluded that the report "is in no sense clearly erroneous in any particular; but, on the contrary, it is eminently sound in each particular on which objection or comment has been made, as well as in all other respects, and that therefore it should be adopted by the court." It further found that no constitutional rights of any of the Parkhill companies had been violated. Adopting the report in full, the court entered judgment against the Parkhill companies, jointly and severally, for $2,577,759.53. This represents the sum found owing by the master plus interest and penalties which had accrued through the date of judgment. The funds were ordered disbursed as the master had reported. The present appeal followed. The Government has not cross-appealed.

I. Due Process.

Parkhill counsel argues that as a result of the seizure by the Government of the companies' assets located in the United States, the companies have been unable to afford to prepare a defense and as a result have been denied due process of law. The companies cite many cases which hold that a basic requirement of due process is the right to be heard, although we note that none of these cases indicates that an indigent corporation has a right to counsel compensated by the Government in a civil case. The companies also cite cases which hold that a corporation may only appear in court by counsel; but these are unavail-

ing because the Parkhill companies have at all times been represented by counsel in proceedings involving issues of law, such as the present appeal, and they have not shown that counsel could not have appeared under a similar arrangement at the hearing on the factual issues. The essence of the companies' argument is that they lacked funds to conduct discovery and use accounting services necessary for a defense.

Tax assessments by the Commissioner are presumed correct. Although the Government has the burden of proving fraud by clear and convincing evidence, the findings of fraud by the trier of fact must be affirmed unless clearly erroneous. *Estate of Upshaw* v. *Commissioner*, 416 F. 2d 737, 740-41 (7th Cir. 1969), *cert. denied*, 397 U. S. 962 (1970). The taxpayer has the burden to show an assessment is incorrect. *United States* v. *Lease*, 346 F. 2d 696 (2d Cir. 1965). A general denial of liability is insufficient to meet the taxpayer's burden. *United States* v. *Prince*, 348 F. 2d 746 (2d Cir. 1965). We do not interpret the Supreme Court's decision in *Commissioner* v. *Shapiro*, ____ U. S. ____, No. 74-744 (March 8, 1976), 44 U. S. L. W. 4313, as modifying these general rules so long as the Government shows that its claims have a basis in fact.

When this court remanded this case for trial, it was implicit in our holding that the Parkhill companies should make a good faith attempt to defend their rights. 484 F. 2d at 706-07. The court stated: "The contention that the Government's actions will cause an unfair trial in the future is still capable of determination only after that trial takes place." *Id.* at 707. The opinion in *United States* v. *Brodson*, 241 F. 2d 107 (7th Cir. *en banc* 1957), *cert. denied*, 354 U. S. 911, upon which this court relied in remanding, indicated that a denial of due process claim should not be decided prior to trial because many factors could cause decision of the issue to become unnecessary. Inherent in the prematurity holding was the contemplation that a trial would be held at which the defendants would make all reasonable efforts to defend. The Parkhill companies did nothing to protect their rights at the hearing.

Our prior holding denying access to the seized funds for use by the Parkhill companies for legal and other costs contains no suggestion that a look at the situation after trial would find an overreaching of constitutional violative proportions where there was no convincing showing of an effort to take all reasonably available steps by way of asserting defenses. Here, no doubt, it was deemed that the picture of lack of fairness of proceedings, or lack of due process, would be more explicit and dramatic if there was no participation whatsoever. We find no indication in the record, however, that either the district court or the special master permitted the Government to gain a victory on a simple default basis.[4] We find no indication that the special master in conducting the hearing or the district judge in approving the report relieved the Government of the necessity of proving its case. That doing so may have been easier for the Government because of lack of opposing counsel does not cause the resulting trial to lack due process.

The fairness of procedure that is due process is not determined by isolating out of context one part of the total proceedings by which rights are determined. Viewing the situation here from that point of view, we are unable to agree with the Parkhill companies that a reversal is required for the purpose of affording them an opportunity for participating in a trial. They have already declined that opportunity.

In their original brief in this court, apparently anticipating a Government argument, the Parkhill companies stated:

> The Government has suggested that the refusal of Parkhill counsel to participate in that trial is solely based upon the unwillingness of the lawyers to spend the time required without assurance of being paid. That clearly is not the case, as has been demonstrated by the participation of counsel in these proceedings where matters of law alone are involved.

4. The appellants' argument carried to its logical extreme would seem to exclude the possibility of default judgments since the defendants in such cases have been denied a hearing. The prime emphasis, it appears to us, in the due process context is whether there is an opportunity for a fair hearing.

The only reason which we find suggested for the same "participation of counsel" not carrying over into the special master's hearing is that there was no money with which to hire accountants and to engage in discovery. We will have to have it demonstrated to us, however, that if competent counsel (and there has been no indication in the present case that the Parkhill companies' counsel was otherwise than well qualified) participates in a hearing, even though complex facts are involved, he cannot by dint of cross-examination and objection demonstrate the frailties of the efforts of the party having the burden of proof, here the Government. Also, here we note that counsel was no newcomer to the litigation but presumably would have brought with him during participation in the hearing a background of information that would have served to demonstrate, if they existed, the weaknesses of the Government's case. Counsel did reactivate after the master's report was filed and presented and argued objections to the district court which rejected them.

In sum, we hold that the Parkhill companies were not denied due process of law. The companies made the tactical choice not to participate in the hearing and cannot complain now that they were denied due process. Undoubtedly many of the companies' difficulties have been caused by the dispute between the majority and minority shareholders, Mr. Sceats and Mr. Leonard, and by Mr. Sceats' somewhat understandable reluctance to risk criminal prosecution by entering the United States to testify and present his version of the events. Nevertheless, the United States did not cause the dispute between the shareholders; and the fact that a knowledgeable witness, for reasons satisfactory to him, declines to testify does not vitiate the proceedings from which he absented himself.

II. Availability of All Companies' Assets.

Some of the items seized by the Government were the property of LTD and CONSTRUCTION. The Government

argues that these assets are available to satisfy the debts of INC either under a fraudulent transfer theory or upon the premise that the companies are alter egos of each other. Because of the conclusion we reach on the alter ego theory, we need not consider the fraudulent transfer theory.

The Parkhill companies argue that even assuming the findings upon which the master relied were correct, the Government failed as a matter of law to sustain its allegation that the companies were alter egos of each other. The basis for this argument is that the master did not find that the corporations had no business purpose. The companies rely on cases such as *Moline Properties Inc.* v. *Commissioner,* 319 U. S. 436 (1943), and *National Carbide Corporation* v. *Commissioner,* 336 U. S. 422 (1949), as well as others, which hold that for the purpose of determining taxes, corporate entities may not be disregarded even where a high degree of control is maintained by one over others if the corporations have a business purpose. These cases are inapposite because the Commissioner did not disregard the corporate entities in assessing taxes. The Commissioner argued, and the lower court found, that the corporate entities could be disregarded for the purpose of satisfying liabilities. This was not a tax theory but rather was a theory that was available to any creditor.[5]

In *Steven* v. *Roscoe Turner Aeronautical Corp.,* 324 F. 2d 157, 160 (7th Cir. 1963), upon which the special master relied, this court stated the elements which must be present for one corporation to be held liable for the debts of another:

> [C]ontrol by the parent to such a degree that the subsidiary has become its mere instrumentality; fraud or wrong by the parent through its subsidiary, e.g., torts, violation of a statute or stripping the subsidiary of its assets; and unjust loss or injury to the claimant, such as insolvency of the subsidiary.

5. Government counsel would distinguish these theories by calling the former an alter ego theory and the latter an instrumentality theory. The terminology used in the cases lacks sufficient uniformity to use this distinction. The distinction must be drawn on the basis of whether the corporate entities are being disregarded for the purpose of assessing taxes or for the purpose of collecting liabilities.

We recently reaffirmed this holding in *Bernardin, Inc.* v. *Midland Oil Corp.,* 520 F. 2d 771 (7th Cir. 1975). *Cf. Berger* v. *Columbia Broadcasting System, Inc.,* 453 F. 2d 991, 995 (5th Cir. 1972), *cert. denied,* 409 U. S. 848. This theory has been applied in at least one tax case other than the present one. *In Matter of H. G. Prizant & Co.,* 69-2 U. S. T. C. ¶ 9592 (N. D. Ill. 1969).

The master made many findings which properly support his conclusion that the companies were alter egos. He found that INC and CONSTRUCTION were wholly owned subsidiaries of LTD; the companies had identical officers and directors and were operated as one company; their president considered them as one; the companies had the same offices, the same telephone number, the same accounting service, the same employees, the same mailing address, and the same furniture while only LTD's name appeared on the door of the offices; INC's and CONSTRUCTION's paid-in capital was grossly inadequate; the companies failed to maintain their respective identities when dealing with third parties and failed to maintain customary formalities when dealing with each other; and during the period of 1967 through 1970 the only business of LTD and CONSTRUCTION was leasing equipment to INC, and neither CONSTRUCTION nor LTD produced revenues from third parties. These findings are very similar to the items which this court listed in *Turner* as factors which courts generally consider to determine if the requisite degree of control is being maintained so that one corporation may be considered an instrumentality of another. 324 F. 2d at 161.

Further findings were made from which the special master could properly conclude that sufficient wrong had been committed for the corporate entities to be ignored; indeed, the special master concluded: "A gross injustice would be done if the three Parkhill companies were not treated as one entity."

He found that LTD took title to certain items of equipment although INC apparently paid the purchase price; the companies' president instructed an attorney by letter to take such steps as were necessary to show clear title to certain pieces of equipment in CONSTRUCTION although some of the pieces had been purchased by INC and some by LTD; sometime after that letter, a bill of sale was prepared dated March 15, 1968, purporting to transfer certain items of equipment for the stated consideration of $1.00 and other valuable consideration;[6] one of the items listed on the bill of sale was not manufactured until sometime in 1969; sometime after the letter a bill of sale dated October 15, 1969, was prepared which purported to convey the equipment listed in the bill of sale dated March 15, 1968, and four other items to CONSTRUCTION (From LTD) for the stated consideration of $1.00 and other valuable consideration; the equipment on the bill of sale dated October 15, 1969, included equipment purchased by INC which had a market value in excess of $900,000; the bills of sale dated March 15, 1968, and October 15, 1969, were not reflected upon any books, records, or tax returns of any of the three companies; and during the fourth quarter of 1969 INC's liabilities far exceeded its assets.

In light of these findings, we hold that the special master correctly applied the standards of *Turner* and therefore that his conclusion regarding the availability of the assets of LTD and CONSTRUCTION to satisfy the tax liability of INC must be upheld.

For the reasons given in this opinion the judgment of the district court is

AFFIRMED.

6. Ordinarily we would attach little or no importance to the use of the "One dollar and other valuable consideration" phraseology. This is a commonly used device, without illegitimate connotations, flowing in large part no doubt from a desire to deprive a curious but non-entitled public of knowledge of what the actual contractual consideration might be. While we give its use little significance in the present case, we cannot, in the context of its use, entirely ignore it.

Judgment of United States District Court, Southern District of Illinois, Northern Division. P-3161, entered June 3, 1975.

FINAL DECISION AND ORDER.

After hearing herein on May 9, 1975, pursuant to notice, and consideration of objections to the Master's Report filed by the United States of America and by the Parkhill companies as a group; and after hearing the arguments of counsel thereon, as well as considering the response of the United States to the said Parkhill objections, and the subsequent comments of the trustees of the Central Laborers Pension Fund and other Laborers, and of Standard Service and Supply Co. and Service Parts Supply Co., this court concludes that the said Master's Report is in no sense clearly erroneous in any particular; but, on the contrary, it is eminently sound in each particular on which objection or comment has been made, as well as in all other respects, and that therefore it should be adopted by the court. This court further finds and concludes that no constitutional right of any Parkhill company has been violated.

Accordingly, IT IS ORDERED that the Master's Report filed herein on April 21, 1975, is in all respects ADOPTED, the findings of fact and conclusions of law therein are hereafter to be considered as the findings and conclusions of this court, and the recommendations thereof are ACCEPTED, all as if set out here in full.

IT IS FURTHER ORDERED that the United States of America have judgment against Canadian Parkhill Pipe Stringing, Inc., Canadian Parkhill Construction Equipment, Ltd., and Canadian Parkhill Pipe Stringing, Ltd., jointly and severally, in the sum of $2,577,759.53, together with costs of suit.

IT IS FURTHER ORDERED that the clerk of this court, after payment of any unpaid costs herein therefrom, distribute the Retainage fund in his hands, through counsel of record, to

the following named entities individually, in the amount set opposite the name of each:

Wolf Battery and Electric Service, Inc.	$ 977.79
Wolf-Jacobsen, Inc.	759.80
Central Laborers Pension Fund	23,616.00
Albert Equipment Company, Inc.	25,304.14
Service Parts Supply Co.	2,001.42
Standard Service and Supply Co.	9,404.71
United States of America—The balance of said Retainage in full, same to be shown as a credit on the foregoing Parkhill judgment.	

IT IS FURTHER ORDERED that the entire fund held in escrow by the Northern Trust Company, together with earnings thereon, less proper charges under the terms of the escrow agreement, should be paid to the United States of America, which, upon receipt, will issue credit in the amount thereof on the foregoing Parkhill judgment.

/s/ ROBERT D. MORGAN,
Robert D. Morgan,
United States District Judge.

Entered: June 3, 1975.

MASTER'S REPORT.

To the Honorable Robert D. Morgan, Judge of the United States District Court for the Southern District of Illinois:

I, Bruce W. Black, to whom the above entitled cause was referred as Special Master, do now submit the following report, together with exhibits submitted by the parties and transcripts of the hearings held.

STATEMENT OF ISSUES.

This case was referred to me as Special Master on June 20, 1974, for resolution of all the then remaining issues. The case was first filed in July of 1970 by Avco Delta Corporation Canada Limited (hereinafter Avco Delta) against the United States of America (hereinafter the Government) and three related corporations: Canadian Parkhill Pipe Stringing, Inc. a/k/a Parkhill Pipeline, Inc. (Parkhill INC); Canadian Parkhill Pipe Stringing, Ltd. (Parkhill LTD); and Canadian Parkhill Construction Equipment, Ltd. (Parkhill CONSTRUCTION). The litigation followed seizure of virtually all of the Parkhill companies' assets by the Government and then a public sale of those assets pursuant to an agreement among the parties. In its complaint Avco Delta asserted that chattel mortgages it held on a portion of the Parkhill assets should be given priority over the tax lien claimed by the Government. This issue was decided in Avco Delta's favor by the District Court, and that decision was affirmed by the United States Court of Appeals for the Seventh Circuit. 459 F. 2d 436 (1972). Thus, the original plaintiff is no longer an active party in this case.

The three Parkhill companies and the Government are, however, still disputing ownership of that portion of the sale proceeds which was not paid over to Avco Delta (This fund, of over $600,000, will be referred to as the Sale Proceeds). The dispute over this fund is delimited by the Government's cross-

claim against the three Parkhill companies, filed on April 3, 1972, containing three counts. Count I asserts a tax claim against Parkhill INC in the amount of nearly $2,000,000. Count II alleges that Parkhill INC made certain fraudulent conveyances to Parkhill LTD, its parent company, which should be set aside. As an alternative to Count II, Count III alleges that the three Parkhill companies are the alter egos of each other and that they should be treated as one corporate entity. An answer filed by the three Parkhill companies denies the material allegations of each count.

A second substantial fund is also being disputed. In December of 1970, the Parkhill companies filed a third party complaint against Natural Gas Pipeline Company of America (Natural), which was holding in excess of $200,000 as retainage under a contract with Parkhill INC for certain pipe laying projects in several parts of Illinois (This fund will be referred to as the Retainage, and the contract between Natural and Parkhill INC will be referred to as the Subject Contract). Although all of the contract work had been completed by Parkhill INC, Parkhill INC was unable to furnish Natural with the lien waivers from materialmen and laborers called for by the contract. In August of 1971, Natural paid the Retainage into Court, filing a counterclaim in interpleader naming nearly fifty counterdefendants, including the three Parkhill companies and the Government.

After the District Court had ruled on the interpleader counterclaim in full—by dismissing most of the interpleaded counterdefendants and by ordering the Retainage distributed to various others—and after the Court had ordered a portion of the Sale Proceeds made available to the Parkhill companies for the purpose of financing this litigation, a second round of appeals was made to the Court of Appeals. That court rendered its decision on August 1, 1973, see 484 F. 2d 692, and the United States Supreme Court denied a petition for a writ of certiorari on February 19, 1974, see 415 U. S. 931.

Regarding the Sale Proceeds, the Court of Appeals held that none of that fund could be made available for litigating this cause, 484 F. 2d at 706-07.

Regarding the Retainage, the Court of Appeals held that those counterdefendants having valid claims against Parkhill INC should be allowed to share in the Retainage "in a pro rata fashion to the amounts of their claims arising out of this particular construction project" *Id.* at 705.

Consequently, the principal pending issues as of the reference to me were the following:

1. The amount of Parkhill INC's tax liability to the Government, raised by Count I of the Government's cross-claim.
2. Whether fraudulent conveyances were made by Parkhill INC which should be set aside, raised by Count II.
3. Whether the three Parkhill companies are the alter egos of each other and should be treated as one entity, raised by Count III.
4. Proper distribution of the Retainage, raised by Natural's counterclaim in interpleader and the answers thereto.

Parkhill Inc's Tax Liability.

Although the Government's cross-claim against the three Parkhill companies which raises this issue was filed on April 3, 1972, no formal proceedings in the District Court had touched on this issue as of the date of the reference to me. Shortly after the reference, the Government made several attempts to obtain discovery from the Parkhill companies, and it became apparent that those companies no longer felt able to participate in this litigation. On October 4, 1974, the Government moved for default judgments against the Parkhill companies for failure to provide discovery. The District Court denied the motion on October 25, 1974, and it directed the Government to "present

to the Special Master all the evidence it has." On November 20th, 21st, and 27th I held hearings covering the remaining issues in this cause. No one representing any of the Parkhill companies participated in those hearings. As a result of their failure to participate, the proceedings were somewhat less than full adversary hearings, and this portion of my report can be little more than a rationalization and summary of the evidence presented by the Government.

The Government's tax claim against Parkhill INC is made up of two parts. The first is for withholding and F. I. C. A. taxes for the third and fourth quarters of 1969. The second is for corporate income taxes due for 1967 and 1968. An assessment was made against Parkhill INC on February 6, 1970, for unpaid withholding and F. I. C. A. taxes, including penalties, for the third and fourth quarters of 1969 in the respective amounts of $778,447.10 and $13,677.96. These figures are based on the Form 941's filed by Parkhill INC (Government exhibits 16 and 17), with additions for a failure-to-pay penalty and interest. In their answer to the cross-claim, the Parkhill companies admit that such an assessment was made but deny that such amounts are owing. Nevertheless, without some evidence to support the denial, the Governments evidence stands uncontradicted and is sufficient proof of the amounts stated.

Parkhill INC's income tax liability for 1967 and 1968 poses a more complicated problem. Assistant Revenue Service Representative Eugene C. McVarish conducted an investigation of Parkhill INC's 1967 and 1968 tax returns in which he reconciled the returns with the corporate books and records. His examination led Mr. McVarish to make several adjustments.

The most significant adjustments in both years resulted from disallowing certain deductions claimed for rental expense. The investigation disclosed a scheme whereby Parkhill INC obtained large amounts of heavy construction equipment under leases containing options to purchase. After the options were ex-

ercised and the rental payments applied toward the purchase price, the total purchase price should have been reflected on the books as capital investments, to be depreciated over the years. Parkhill INC, however, did not capitalize its newly purchased assets. Instead, it showed all the payments for the equipment as rental expenses, and deducted those amounts from gross income. The rental deductions included the amounts paid after exercise of the option. Indeed, when the options were exercised, the equipment suppliers were specifically told to supply invoices showing the balance of the purchase price to be rentals. When some of the invoices were not deemed sufficient, employees of Parkhill INC prepared forged invoices.

The fictitious rental scheme was also applied to at least one piece of equipment which was purchased outright rather than through a lease with an option to purchase. Parkhill INC purchased a double jointing rack for over $200,000, giving a promissory note for the full purchase price. The note provided that it would be paid within two years, with the first year's payments to be based on the machine's use. These payments were treated as deductible rental expenses.

The evidence is persuasive that Parkhill INC consistently and fraudulently treated capital expenditures, which should have been depreciated, as rental expenses to be deducted immediately, and that this was done with the intent to evade taxes.

Besides the rental expenses to suppliers, or "outside rentals," Parkhill INC's returns for 1967 and 1968 also claimed deductions for rentals paid to Parkhill LTD and Parkhill CONSTRUCTION, or "inside rentals." For the period from January 1, 1967 to September 30, 1967, Parkhill INC claimed, and Mr. McVarish allowed, deductions based on inside rental payments of $552,000. For the period January 1, 1968 to September 30, 1968, the same figure was claimed and allowed. For the period October 1, 1968 to December 31, 1968, Parkhill INC claimed an inside rental expense deduction of $265,880. Mr. McVarish did not allow this deduction for three reasons.

First, the deductions for the first two periods were supported by lists of equipment owned by Parkhill LTD and Parkhill CONSTRUCTION and used by Parkhill INC, but there was no usage list for the third period. Second, there were apparently no agreements between the companies in advance regarding what rentals would be charged. At the end of the tax year of the two Canadian corporations, a figure would be selected. Third, allowing all the inside rental expenses claimed would have allowed Parkhill LTD and Parkhill CONSTRUCTION to recover from Parkhill INC 142% of the cost of their equipment in just two years. For these reasons, Mr. McVarish was justified in disallowing this claimed inside rental expense deduction for the period October 1, 1968 to December 31, 1968.

Mr. McVarish also disallowed certain interest expenses, $16,643.42 in 1967 and $34,342.01 in 1968. These were for interest payments actually made by Parkhill LTD and Parkhill CONSTRUCTION which were then passed on to Parkhill INC. The reason for this disallowance was that, because Parkhill INC's paid in capital was only $200, use of the parent corporation's money in this manner should be considered paid-in capital rather than a loan. Again, this conclusion is justified by the evidence.

Mr. McVarish also justifiably disallowed a 1967 deduction regarding extra salary for Mr. Hubert B. Sceats, the president of each of the three Parkhill companies.

In addition to the foregoing disallowances, Mr. McVarish made adjustments to reflect: (1) depreciation on the equipment which he had capitalized and (2) an investment credit on the equipment purchased.

In addition to the foregoing adjustments, Mr. McVarish assessed a five percent negligence penalty for 1967 and a fifty percent civil fraud penalty for 1968. Based on the evidence before me, all of these actions appear justified.

After all of these adjustments, jeopardy assessments for income tax of Parkhill INC for 1967 and 1968 were made in

the amounts of $163,065.41 and $589,542.46 respectively. On the date of the assessments, December 11, 1970, interest and penalties brought the total for the two years to $1,146,-043.89.

As of the date of Government Exhibit 1, September 23, 1974, the total tax liability for Parkhill INC was $2,470,233.98. This figure includes the original assessments for F. I. C. A. and withholding for the third and fourth quarters of 1969, income tax for 1967 and 1968 (including the negligence penalty for 1967 and the civil fraud penalty for 1968), a failure-to-pay penalty, and interest. This figure also reflects credits in the amounts of $80,990.59 and $8,582.50. The latter figure is the amount the Government received pursuant to Judge Morgan's order herein of April 12, 1973, disbursing the proceeds of a sale of two tractors. I suspect that the other figure represents the Government's receipts upon settling certain litigation in the United States District Court for the Northern District of Oklahoma. See Government Exhibit 3.

From the evidence before me, it appears that the Government's figures are correct in all particulars.

Disregarding the Separate Corporate Entities.

Count III of the Government's cross-claim against the Parkhill companies alleges that the three corporations should be treated as one entity because they have operated as alter egos of each other. The Government has presented convincing proof of this charge, the proof falling under five main headings.

First, it is undisputed that Mr. Sceats owned seventy percent of Parkhill LTD's stock and that Parkhill LTD owned all the stock of both Parkhill INC and Parkhill CONSTRUCTION. Also, the three companies had identical directors and officers during 1967, 1968, and 1969.

Second, and perhaps most significantly, the Government presented ample evidence that the three companies were oper-

ated as one. All three shared common office space in Toronto, with the same staff and equipment. But only Parkhill LTD's name was on the door. Although only Parkhill INC operated in the U. S. A., its employees purchased products with credit cards issued to Parkhill LTD. Parkhill INC purchased vehicle license plates for equipment owned by Parkhill LTD. Various accounting entries were made transferring funds between Parkhill INC and Parkhill LTD for no reason apparent to the companies' accountants.

No written agreements set out what rents would be paid by Parkhill INC as inside rental for the use of equipment owned by Parkhill LTD and Parkhill CONSTRUCTION. Apparently, at the end of fiscal years, Parkhill INC simply paid as much as it could. Also, numerous items of equipment purchased by Parkhill INC later turned up on the books of Parkhill LTD, with no adequate consideration for the exchange.

One very telling body of evidence indicating how the three companies were operated is Government Exhibit 12. The first document in the exhibit is a bill of sale dated March 15, 1968, from Parkhill INC to Parkhill LTD purporting to convey twenty-one items of equipment for "one dollar and other valuable consideration." The second document in the exhibit is also a bill of sale, and it is identical to the first except that this is from Parkhill LTD to Parkhill CONSTRUCTION, is dated October 15, 1969, and includes 4 pieces of equipment not included in the first bill of sale. The third and final document in the exhibit is a copy of a letter from Mr. Sceats to Attorney Ralph McCreath, secretary of the various companies. It states, in essence, that for Parkhill CONSTRUCTION to obtain the desired loan from Avco Delta, it will be necessary to furnish Avco Delta evidence that certain equipment purchased by Parkhill INC and Parkhill LTD is "on the books of [Parkhill CONSTRUCTION] and is being depreciated." In the letter Mr. Sceats suggests that two sets of minutes be prepared, one transferring equipment from Parkhill INC to Parkhill LTD "as of

the date of receipt of the equipment," the other transferring the same equipment from Parkhill LTD to Parkhill CONSTRUCTION "as of October 15, 1969 for $1.00 and other valuable consideration."

The evidence is conclusive that the first two documents, the bills of sale, are fabrications made pursuant to the Sceats-McCreath letter. First, the date October 15, 1969, is referred to in the letter. Second, one of the items listed on both bills of sale, a Homelite pump, was not manufactured until early 1969, and therefore could not possibly have been conveyed on March 15, 1968. Third, many other items of equipment listed on both bills of sale were not acquired by Parkhill INC until sometime during the latter half of 1968. Finally, one of the items listed on the second bill of sale but not on the first one, a double jointing rack, had been purchased by Parkhill INC for over $200,000, and had apparently never been conveyed to Parkhill LTD.

The foregoing evidence illustrates that the three companies were operated as one. In addition, the president and principal owner of all three companies apparently believed that the companies operated as one. In a deposition taken during litigation between the Government, the three Parkhill companies, and CRC Crose International Inc., in the United States District Court for the Northern District of Oklahoma, in response to a question regarding the location of Parkhill INC's office, Mr. Sceats stated:

> "Well, I can't split it. I would say all the Parkhill companies were one. We didn't have a separate office for Parkhill Pipeline, no. It was never listed in the phone book under Parkhill Inc., it was always under Limited's name." See Government Exhibit 3, vol. 1, page 13.

The third factor weighing in favor of considering the three companies as one is the grossly inadequate capitalization of the two subsidiaries. Parkhill INC's balance sheet states paid-in capital of $200. Yet the company's gross revenue in 1967 was

roughly $5,500,000, and in 1968 nearly $12,000,000. Parkhill CONSTRUCTIONS' paid-in capital was only $3. Thus, no margin of loss was provided from which creditors could be paid if business fortunes were bad. On the other hand, Parkhill LTD, the parent, had no need for working capital, since it was not doing business with anyone but its wholly owned subsidiaries.

This brings us to the fourth factor: only Parkhill INC was generating income from outside sources. Parkhill LTD and Parkhill CONSTRUCTION were doing nothing except leasing equipment to Parkhill INC. There is no valid business purpose for such an arrangement. Instead, it was a fairly obvious attempt to keep business liabilities in one corporation and assets in the others.

The final factor is that the normal corporate formalities were ignored. In addition to those facts recited under the second factor above, there is evidence that no regular corporate minutes were kept, and that Mr. Sceats on one occasion suggested that fictional corporate minutes be prepared and back-dated to reflect desired transactions.

It is clear to me that a gross injustice would be done if the three Parkhill companies were not considered as one entity, given the facts shown persuasively by the evidence and only partially reiterated in this narrative portion of my report.

In light of my above conclusion regarding the alter ego issue, it is unnecessary to treat the fraudulent conveyance issue separately. It is sufficient to merely observe that the transactions reflected by Government Exhibit 12 were surely fraudulent conveyances under the law of Illinois or that of any other jurisdiction which might be applicable.

RETAINAGE.

In its interpleader counterclaim Natural named forty-nine counterdefendants which it believed might be entitled to some

portion of the Retainage. Answers claiming part of the Retainage were filed by some thirty of the counterdefendants, but only five of these claimants had taken steps under Illinois law to reduce their claims to judgment or to perfect a lien. In February of 1972, on motions by Parkhill INC and Natural, the District Court dismissed all those claimants which had not pursued their legal remedies in one of these two ways.

In September of 1972, the District Court ordered that the Retainage be divided as follows:

"To: Wolf Battery & Electric Service, Inc. $942.99, plus 6% interest from March 26, 1970

To: Wolf-Jacobsen, Inc. $759.80, plus 6% interest from March 26, 1970

To: The Laborers $23,616.00, plus reasonable attorney's fees proved by September 20, 1972.

To: Frank O. Wetmore II $11,075.00

To: USA The balance of the registry account herein."

The first two companies had reduced their claims against Parkhill INC to judgments in Illinois Courts and had instituted garnishment proceedings against Natural. The third party, the trustees of the Laborers Union Pension Fund, had sued INC in Illinois courts naming Natural a garnishee defendant. The fourth party, Frank O. Wetmore II, an attorney for the Parkhill companies, had asserted an attorneys lien against the fund. The final party, the Government, had taken several steps to perfect its tax lien.

Three of the counterdefendants whose claims had been dismissed—Albert Equipment Co., Service Parts Supply Co., and Standard Service & Supply Co.—successfully appealed those dismissals. The Court of Appeals held that all claimants were entitled to share in the Retainage pro rata to the extent that their claims arose from the Subject Contract, regardless of whether they had pursued their legal remedies. 484 F. 2d 698-705. The Court of Appeals also suggested that the counterdefendants which had not appealed from their dismissals might

be barred from any recovery by the final judgments against them. *Id.* at 701 n.6 and at 705. In addition, the Court of Appeals disallowed the grant of attorney's fees to the Laborers, *id.* at 705, and the award to Attorney Wetmore, *id.* at 706.

Following the Supreme Court's denial of the petition for a writ of certiorari, the District Court sent notice to counsel for all parties who had ever appeared in this cause stating that a special pre-trial conference would be held on June 17, 1974, and inviting attendance by any parties who might desire to assert claims against the Retainage. None of the dismissed counter-defendants, except the three which had appealed, appeared at this pre-trial conference.

After my appointment as Special Master, I scheduled a hearing for August 13, 1974, on the issues of what portions of the various claims against the Retainage (excepting the Government's) arose from the Subject Contract. The parties were advised that evidence in the form of affidavits would be sufficient, unless objected to; and on or before the date of the hearing seven affidavits were filed on behalf of the following claimants in the following amounts:

1.	Wolf Battery and Electric Service, Inc.	$ 977.79
2.	Wolf-Jacobsen, Inc.	759.80
3.	Central Laborers Pension Fund	23,616.00
4.	Albert Equipment Company, Inc.	25,304.14
5.	Service Parts Supply Co.	2,001.42
6.	Standard Service and Supply Co.	9,404.71
7.	Claude Bailey	4,000.00

None of the parties objected to any of the affidavits. The first six tie the amounts listed directly to the Subject Contract, and I accept the claims set out in those six affidavits as adequately proved, both in amount and as arising from the Subject Contract (Although the affidavit and supporting documents submitted by Albert Equipment Co. state a claim against Parkhill LTD rather than Parkhill INC, none of the parties

have objected to this claim. Because the debt does appear to have arisen from the Subject Contract, because Parkhill LTD did not perform any work in the U. S. A. during this time and did not perform the Subject Contract, because the Parkhill companies did not maintain their separate identities, and because there were no objections, I believe this claimant should share in the Retainage).

Mr. Bailey's affidavit, however, would not appear to connect his claim to the Subject Contract. The affidavit asserts, first, a claim for "storage area furnished to the Parkhill Companies for their equipment, pipe and supplies during their construction of the pipeline through Bureau County, Illinois, from about November 1, 1969 to July 16, 1970. Second, the affidavit asserts a claim for:

> "Use of the Bailey land for the Internal Revenue Service sale of July 16, 1970, said land having been so used not only on that date, but also before that date (in preparation for said sale) and after that date (until the other heavy equipment that had been brought to the Bailey land for said sale was sold and actually removed from said land)."

The alleged value for both of these uses is $4,000, and the affidavit does not attempt to allocate that amount between the two different uses.

Use of his land for storage of equipment after completion of the work under the Subject Contract would clearly not entitle Mr. Bailey to share in the Retainage under the Court of Appeals decision, because the claim for that use cannot fairly be said to arise from the Subject Contract. Therefore, because the affidavit fails to allocate the amount claimed between the two uses, this affidavit is not sufficient to justify Mr. Bailey's sharing in the Retainage. Moreover, at the hearing on what portion of the Government's claim arose from the Subject Contract, a former officer of Parkhill INC testified that work on the Subject Contract had been completed in September of 1969.

Transcript of November 20, 1974 hearing before Special Master, testimony of Richard L. Leonard, page 170. That would indicate that none of Mr. Bailey's storage claim arose from the Subject Contract, because the storage is alleged to have begun "about November 1, 1969." It is also to be noted that Mr. Bailey was not named a counterdefendant in Natural's interpleader counterclaim, nor did he attempt to intervene in that phase of the litigation.

The remaining party claiming a portion of the Retainage is the Government, and what portion of its tax claim against Parkhill INC arose from the Subject Contract is problematic. The Government's answer to Natural's interpleader counterclaim asserts that Parkhill INC owed nearly $800,000 in unpaid withholding and F. I. C. A. taxes from the third and fourth quarters of 1969, that the Government had perfected its tax lien in that amount, and that that lien gives the Government the right to receive the Retainage. At the hearing on this issue, however, witnesses called by the Government testified that during the last half of 1969 Parkhill INC had work in addition to that under the Subject Contract. Therefore, not all of Parkhill INC's withholding and F. I. C. A. tax liability for the third and fourth quarters of 1969 arose from the Subject Contract.

The witnesses called by the Government could offer no specific evidence on what portion of the claim for withholding and F. I. C. A. taxes arose from the Subject Contract and what portion arose from other contracts. The witnesses estimated, over objections by counsel for other claimants, that roughly ninety percent of the employees of Parkhill INC during the period were working under the Subject Contract. Transcript of November 20, 1974 hearing before Special Master, testimony of William Baun, pages 99-100, and testimony of Richard L. Leonard, pages 169-70. It is my view that this testimony is not sufficient proof to allow the Government to a pro rata share of the Retainage.

Nor can the Government persuasively argue that it should be granted additional discovery on this issue. The Government's efforts at discovery made since June 20, 1974, have been aimed entirely at the alter ego issue under Count III of its cross-claim. Indeed, at no time since the counterclaim was filed, in August of 1971, has the Government sought discovery to determine what portion of its claim for taxes arose from the Subject Contract. Nevertheless, it is not to be doubted that a substantial part of the Government's claim for withholding and F. I. C. A. taxes for this six month period did arise from the Subject Contract.

Given these circumstances, it is my view that the six claimants which have proved specific claims against the Retainage should have their claims satisfied in full, amounting to approximately $62,000, and that the balance of the Retainage, approximately $143,000, should be paid to the Government.

One additional point merits consideration here. In August of 1974, Attorney James D. Wing, when filing the above-mentioned affidavits on behalf of Standard Service and Supply Co. and Service Parts Supply Co., also filed a motion to compel discovery, asserting that the Government had failed to answer certain interrogatories served on it. The basis of the motion, as stated in counsel's letter to me dated August 5, 1974, was as follows:

> "In addition to these claims which are clearly referrable to the Natural Gas job, it appears as though my clients may have additional claims against the retainage based on certain equipment which was sold or leased to Parkhill at field offices other than those pertaining to the Natural Gas job but which apparently were used by Canadian Parkhill in the completion of that job. It is the position of my clients that these claims are also properly brought against the retainage."

It is my view that such claims against Parkhill INC, even if proved, could not support a claim against the Retainage under the Court of Appeals decision, because they did not *arise* from

the Subject Contract. Attorney Wing has not pursued this matter, although invited to do so in my letter of August 10, 1974, sent to all counsel of record. Accordingly, this motion, must be, and is hereby, formally denied.

Findings of Fact*

A. Parkhill Inc's Total Liability

1. On February 6, 1970, a delegate of the Secretary of the Treasury made an assessment against Parkhill INC for the third and fourth quarters of 1969 for withholding and F. I. C. A. taxes in the amounts of $778,477.10 and $13,677.96, respectively, including penalties and interest to that date. GEx 1.

2. The Certificate of Assessments and Payments, Form 4340, and the attached affidavit reflect that the outstanding balance due the Government from Parkhill INC for withholding and F. I. C. A. taxes on September 23, 1974 was $911,009.21. GEx 1.

3. The assessment for withholding and F. I. C. A. taxes, including penalties, made against Parkhill INC was based upon investigation of Parkhill INC's 941 forms for the third and fourth quarters of 1969. GEx 16 and 17. T 93-117.

4. On December 11, 1970, a delegate of the Secretary of the Treasury made jeopardy assessments against Parkhill INC for the tax years ending on December 31, 1967 and December 31, 1968 for income taxes in the amounts of $198,006.08 and $948,037.81, respectively GEx 1.

5. The assessment against Parkhill INC for its 1968 income tax liability included a 50% civil fraud penalty pursuant to 26 U. S. C. § 6653(b), based on the intent of Parkhill INC and its President, Mr. Sceats, to evade taxes. GEx 1. T 258-60, 185-87.

* Citations marked "GEx" refer to the various Government exhibits presented in the hearings on November 20th, 21st, and 27th of 1974. Citations marked "T" refer to the transcript of those hearings.

6. The Certificate of Assessments and Payments, Form 4340, and the attached affidavit show that the outstanding balance due the Government from Parkhill INC for income taxes from 1967 and 1968 was, as of September 23, 1974, $1,599,244.77. GEx 1.

7. The assessment for income taxes, including penalties, made against Parkhill INC resulted from an investigation conducted by a delegate of the Secretary of the Treasury. Upon audit and examination of Parkhill INC's 1967 and 1968 income tax returns, and upon reconcilliation of those returns with the company's books and records, the investigator reasonably and correctly determined that certain deductions from gross income for the years should be disallowed. T 182-97.

8. Payments made by Parkhill INC for the purchase of the equipment described in Government Exhibits 5, 6, 9, 10, and 11 were fraudulently deducted as rental expenses on Parkhill INC's 1968 income tax return. GEx 15B.

9. During September or October of 1968, Parkhill INC exercised its options from the John Fabick Tractor Co. to purchase the equipment listed in Government Exhibits 5A through 5G. T 55-59, 140-146.

10. During September or October of 1968, Parkhill INC exercised the options from the Gateway Machinery Co. to purchase the equipment listed in Government Exhibits 6A and 6B, and Parkhill INC subsequently paid the balance owing on this equipment, in spite of the fact that the option ran in favor of Parkhill LTD. GEx 6A p. 3; GEx 6B, p. 3; GEx 6C; GEx 8, pp. 7-8 T 58-59, 140-46.

11. In September of 1968, Mr. Hubert B. Sceats, president of Parkhill INC, directed Mr. William Baun, field office manager for Parkhill INC, to obtain invoices covering the balance of the purchase prices of the pieces of equipment listed in Government Exhibits 5A through 5G and 6A and 6B reflecting rental charges instead of outright purchases. T 21, 57-62, and 71-72.

12. Mr. Sceats intended that the amounts expended for the Fabick and Gateway equipment be treated for tax purposes as deductible rental expenses of Parkhill INC rather than as capital investments. T 57-58.

13. Pursuant to Mr. Sceats' instructions, Mr. Baun instructed the Fabick and Gateway companies to submit rental invoices for periods in which operations had halted and for which it had been agreed that no rentals would be charged. These "back rental" invoices were to cover a portion of the remaining purchase price of the equipment. T 61-64.

14. The Fabick company issued two invoices for each piece of its equipment being sold to Parkhill INC, all dated November 26, 1968. One invoice for each piece was marked "back rental" and covered the "shutdown" periods, and the other was marked "final billing." The sum total of the two invoices equaled the balance due on the purchase price of the various pieces of equipment. GEx 5A pp. 11 and 12; 5B pp. 12 and 13; 5C pp. 12 and 13; 5D pp. 11 and 12; 5E pp. 12 and 13; 5F pp. 12 and 13; and 5G pp. 10 and 11. T 59-64.

5. The Gateway company also issued two invoices for each piece of its equipment being purchased by Parkhill INC, also dated November 26, 1968. One invoice for each piece was marked "back rental" and covered the "shutdown" periods, and the other was marked "final billing." The sum total of the two invoices equaled the balance due on the purchase price of the respective pieces of equipment. Both invoices were directed to Parkhill LTD. GEx 6A pp. 11 and 12; and 6B pp. 10 and 11. T 59-64.

16. In December of 1968, Mr. Sceats refused to authorize payment for the Fabick and Gateway invoices marked "final billing" and he instructed Mr. Baun to prepare invoices with similar amounts reflected as rental expenses. T 64-68, 71-72.

17. Mr. Baun and a Mr. Jim Raymond used a Xerox photocopy machine to obtain partially blank photo copies of the in-

voices received from the Fabick and Gateway companies marked "final billing." Information was then typed onto the blanks reflecting the amounts listed on the "final billing" invoices as rental payments for excess hours of use. The altered Gateway invoices were directed to Parkhill INC. GEx 7, T 69-72.

18. Invoices received by Parkhill INC's field office were marked with a posting stamp which had a blank for designation of which company account the invoice payment should be charged to. After designation of an account, the invoices were forwarded to the Toronto office for payment. T 53-54.

19. Account 4020 designated the "outside rentals" account of Parkhill INC; and by stamping an invoice with the posting stamp and inserting the number 4020 into the account blank, the field office indicated that payment of the invoice should be charged to the "outside rentals" account of Parkhill INC. T 74-76.

20. After exercising the options to purchase equipment from the Fabick and Gateway companies, Parkhill INC received two invoices for each piece of equipment, one marked "back rental" and the other marked "final billing." The invoices marked "back rental" were stamped with a posting stamp and the number 4020 was inserted, authorizing the payment to be charged to the "outside rental" account. The invoices marked "final billing" were altered to reflect excess use rentals and the altered invoices were also stamped with a posting stamp and the number 4020 was inserted, authorizing the payment to be charged to the "outside rental" account. GEx 8. T 74-76.

21. In September of 1968, Parkhill INC exercised its option to purchase a John Deere crawler from Bemidgi Implement and Rambler Co. at a cost of $14,300. GEx 9 pp. 1-2. T 86-88.

22. At Mr. Sceats' direction, the Bemidgi company was instructed to prepare invoices reflecting the balance of the

purchase price as rental expenses. Such invoices were submitted for back rentals covering "shutdown" periods and excess hour rentals. GEx 9.

23. Mr. Sceats intended that the amount expended for the Bemidgi equipment be treated for tax purposes as deductible rental expenses rather than as capital investments. T 88, 57-58.

24. In early 1968 Mr. Sceats authorized the purchase by Parkhill INC of a double jointing rack from CRC-Crose International, Inc. for the purchase price of $211,366.30. GEx 10. T 77-86; 148-54.

25. The double jointing rack was paid by a promissory note dated April 13, 1968. The note provided for payments during the first twelve months based on the number of welds performed by the rack. GEx 10 p. 1.

26. At Mr. Sceats' direction, billing memos received from CRC-Crose were stamped with the posting stamp and the number 4020 was inserted, authorizing the payment to be charged to Parkhill INC's "outside rental" account. GEx 10 pp. 8, 10, and 13. T 81-82.

27. Mr. Sceats intended that the amounts expended for the double jointing rack be treated for tax purposes as deductible rental expenses rather than as capital investments. T 82-83.

28. In July of 1968, Parkhill INC purchased a bombardier carrier from Halvorson Equipment, Inc. for $8,500. GEx 11. T 270-274.

29. At Mr. Sceats' direction, Mr. Kenneth Maguire, Parkhill INC's Toronto office accountant, instructed the Halvorson company to submit rental expense invoices to replace the original invoice for the purchase price of the carrier. T 271-72.

30. Mr. Sceats intended that the amount expended for the carrier be treated for tax purposes as deductible rental expenses rather than as a capital investment. T 273.

31. The civil fraud penalty assessed against Parkhill INC for the 1968 tax year was reasonable and correct in light of the evidence.

32. As of September 23, 1974, Parkhill INC's total liability was $2,470,233.98, including penalties and interest to that date. GEx 1.

33. The above tax liability of $2,470,233.98 will accrue interest at the rate of $287.74 per day after September 23, 1974. GEx 1.

34. The above tax liability of $2,470,233.98 will accrue failure-to-pay penalty at the rate of $3,826.51 on the first day of every month commencing October 1, 1974. GEx 1.

B. *Corporate Entity*

35. Mr. Sceats owns seventy percent of the stock of Parkhill LTD. GEx 3. T 36.

36. Parkhill INC and Parkhill CONSTRUCTION are both wholly owned subsidiaries of Parkhill LTD. GEx 3. T 35, 131.

37. Parkhill LTD, Parkhill INC, and Parkhill CONSTRUCTION had identical officers and directors from 1967 through 1969. GEx 3. T 21.

38. Mr. Sceats, the president and a director of all three companies, considered the three entities as one. GEx 3. T 28.

39. Parkhill LTD, Parkhill INC, and Parkhill CONSTRUCTION failed to retain their respective identities when dealing with third parties. GEx 6, 10, 11, and 14.

40. Petroleum products purchased by Parkhill INC for use in equipment in the United States were paid for on Parkhill LTD credit cards. GEx 13.

41. Vehicle license plates used on equipment owned by Parkhill LTD were purchased by Parkhill INC as the true owner. GEx 24.

42. Parkhill INC entered accounts payable to Parkhill LTD on its corporate books of accounts without apparent justification. GEx 21, paragraphs 1, 2, and 5.

43. Parkhill LTD entered accounts receivable from Parkhill INC on its corporate books of accounts without apparent justification. GEx 20, paragraphs 1, 2, and 4.

44. The equipment described in items 1 through 12 of Paragraph V of Count II of the Government's Cross-Claim (with the exception of an error in the description of item number 11) was conveyed by a bill of sale dated November 26, 1968 from John Fabick Tractor Co. to Parkhill INC. GEx 5H.

45 The equipment described in items 13 and 14 of Paragraph V of Count II of the Government's Cross-Claim was conveyed by a bill of sale dated November 26, 1968, from Gateway Machinery Co. to Parkhill LTD, although the purchase price had apparently been paid by Parkhill INC. GEx 6C. T 58-66. GEx 7 pp. 14-15.

46. In a letter dated October 30, 1969, Mr. Sceats instructed Attorney Ralph S. McCreath, an officer and director of each of the three Parkhill companies, to take such steps as were necessary to be able to show clear title to certain pieces of equipment in Parkhill CONSTRUCTION, although some pieces had been purchased by Parkhill INC and some by Parkhill LTD. GEx 12, pp. 11-12. T 21, 229-32.

47. Some time after October 30, 1969, a bill of sale dated March 15, 1968 was executed by Mr. Sceats and Mr. McCreath on behalf of Parkhill INC purporting to convey the first twelve items of equipment (among others) described in Paragraph V of Count II of the Government's Cross-Claim to Parkhill LTD for the stated consideration of $1.00 and other valuable consideration. GEx 12, pp. 1-5.

48. Included on the bill of sale dated March 15, 1968 is a 1969 Homelite Pump, Model 3" 120, Series No. 3094167, which was neither manufactured by Homelite nor sold to Parkhill INC until sometime in 1969. GEx 12, p. 4; GEx 22. T 220-23.

49. Much of the other equipment included on the bill of sale dated March 15, 1968, was not purchased by Parkhill

INC until September of 1968. GEx 12, p. 4; GEx 5. T 55-59, 143-144.

50. Sometime after October 30, 1969, a bill of sale dated October 15, 1969 was executed by Mr. Sceats and Mr. McCreath on behalf of Parkhill LTD purporting to convey the equipment listed in the bill of sale dated March 15, 1968, and four other items, to Parkhill CONSTRUCTION for the stated consideration of $1.00 and other valuable consideration. GEx 12, pp. 6-10.

51. Included on the bill of sale dated October 15, 1969, is the double jointing rack which Parkhill INC had purchased from CRC-Crose International, Inc., and which had never apparently been conveyed to Parkhill LTD. GEx 12, p. 9; GEx 10. T 92-93, 155-57.

52. Also included on the bill of sale dated October 15, 1969, is the equipment purchased from Gateway Machinery Co. and conveyed by them to Parkhill LTD although the purchase price had apparently been paid by Parkhill INC. GEx 12, p. 9; GEx 6. Finding of Fact 42.

53. The equipment purchased by Parkhill INC listed on the bill of sale dated October 15, 1969, had a market value of more than $900,000. GEx 12, p. 9. T 157-58.

54. The bills of sale dated March 15, 1968 and October 15, 1969 are not reflected upon any books, records, or tax returns of any of the three Parkhill companies. GEx 15 and 23. T 210-11.

55. On November 13, 1969, Parkhill CONSTRUCTION executed and delivered to Avco Delta a chattel mortgage which granted a security interest in the equipment listed in Paragraphs V, VI, and VII of Count II of the Government's Cross-Claim. (This fact is admitted in the "Answer of Parkhill Companies to Cross-Claim of United States of America" filed herein on June 29, 1972.)

56. Parkhill INC had furnished the entire purchase price for much of the equipment mortgaged by Parkhill CONSTRUCTION, and Parkhill INC had furnished a substantial portion of the purchase price for other equipment covered by the mortgage. T 184-85, 198-99, and 201.

57. During the fourth quarter of 1969 Parkhill INC's liabilities far exceeded its assets. T 212-213.

58. Parkhill INC's paid-in capital of $200 was grossly inadequate considering the nature and magnitude of its business, which included gross revenues of approximately $5,500,000 in 1967 and nearly $12,000,000 in 1968. GEx 15. T 192.

59. Parkhill CONSTRUCTION's paid-in capital of $3 was grossly inadequate considering the nature and magnitude of its business, which included gross revenues of $400,000 for the year ended September 30, 1968. GEx 23C pp. 5 and 8.

60. No formal agreements set forth rental or loan transactions among the three Parkhill companies. T 189-93.

61. The only business of Parkhill LTD and Parkhill CONSTRUCTION from 1967 through 1970 was leasing equipment to Parkhill INC. GEx 3. T 128-30.

62. Neither Parkhill LTD nor Parkhill CONSTRUCTION produced revenues from third parties during 1967 through 1970. GEx 3. T 22-23, 26, 40, and 137-38.

63. One executive office in Toronto served all three Parkhill companies, with the same telephone number and switchboard, the same accounting service, the same employees, the same mailing address, and the same furniture. T 28-29, 32, 124-26, 135, and 164-65.

64. Only Parkhill LTD's name appeared on the door of the executive office for the three companies. T 125 and 164.

65. The evidence establishes that Parkhill INC, Parkhill LTD, and Parkhill CONSTRUCTION were operated as one company.

66. A gross injustice would be done if the three Parkhill companies were not treated as one entity.

C. *Natural Gas Retainage.*

67. The Court Registry presently contains $205,000 which was deposited in connection with the counterclaim in interpleader filed herein by Natural Gas Pipeline Company of America.

68. The claims against the Retainage of the following parties, in the following amounts, arose from the Subject Contract between Natural and Parkhill INC:

A.	Wolf Battery and Electric Service, Inc.	$ 977.79
B.	Wolf-Jacobsen, Inc.	759.80
C.	Central Laborers Pension Fund	23,616.00
D.	Albert Equipment Company, Inc.	25,304.14
E.	Service Parts Supply Co.	2,001.42
F.	Standard Service and Supply Co.	9,404.71

69. The claim of Claude Bailey for $4,000 did not arise from the Subject Contract.

70. Except for the Government, no present or former parties to this action are entitled to any portion of the Retainage except as stated in Finding of Fact 68.

71. A substantial but undetermined amount of the Government's claim against Parkhill INC for withholding and F. I. C. A. taxes from the third and fourth quarters of 1969 arose from the Subject Contract. This undetermined amount exceeds the amount of the Retainage.

Conclusions of Law.

1. This Court has jurisdiction over the parties and the subject matter of this cause pursuant to 28 U. S. C. §§ 1335, 1340, and 1345, and 26 U. S. C. §§ 7401 and 7402.

A. *Parkhill Inc's Total Tax Liability.*

2. The assessments against Parkhill INC for federal income, withholding, and F. I. C. A. taxes are presumptively correct. *Welch* v. *Helvering,* 290 U. S. 111 (1933); *Estate of Upshaw* v. *C. I. R.,* 416 F. 2d 737 (7th Cir. 1969).

3. This presumption of correctness does not apply to the assessment of the fifty percent civil fraud penalty, and the Government must prove justification for such a penalty by the clear and convincing weight of the evidence. *Estate of Upshaw* v. *C. I. R., supra.*

4. In order to rebut the prima facie case established by the presumptive correctness of the assessments, it is necessary for Parkhill INC to establish by a preponderance of the evidence that the assessments were incorrect. *United States* v. *Lease,* 346 F. 2d 696 (2d Cir. 1965).

5. Parkhill INC has failed to meet its burden of proof, because the mere general denial of liability, unsupported by any evidence, is insufficient to overcome the presumptive correctness of the assessments. *United States* v. *Prince,* 348 F. 2d 746 (2d Cir. 1965).

6. The civil fraud penalty assessment against Parkhill INC was properly made pursuant to 26 U. S. C. § 6653(b), because the clear and convincing weight of the evidence proves that Parkhill INC intentionally understated its taxable income on its 1968 federal income tax return with the intent to thereby evade taxes. *Bender* v. *C. I. R.,* 256 F. 2d 771 (7th Cir. 1958); cf. *United States* v. *Plastic Electro-Finishing Corporation*) 313 F. Supp. 330 (E. D. N. Y.) 1970).

7. The certified copies of Certificates of Assessments and Payments, Form 4340, introduced by the Government in this proceeding establish that the federal tax liabilities, penalties, and interest assessed against Parkhill INC are legally due and

owing, and they provide a valid basis for judgment in favor of the Government.

8. Accordingly, the Government has established its case for federal tax liabilities assessed against Parkhill INC, and the Government is entitled to judgment against Parkhill INC in the amount of $2,470,233.98, which represents tax, penalty, and interest due from Parkhill INC through September 23, 1974, plus interest which accrues at a rate of $287.74 per day and a failure-to-pay penalty which accrues at the rate of $3,826.51 per month at the first of every month commencing October 1, 1974.

B. *Corporate Entity*

9. The facts in this cause establish that the three Parkhill companies are the alter egos of each other, and they must be considered to be one legal entity. *Steven* v. *Roscoe Turner Aeronautical Corp.,* 324 F. 2d 157 (7th Cir. 1963); *cf. Moline Properties, Inc.* v. *C. I. R.,* 319 U. S. 436 (1943); *Britt* v. *United States,* 431 F. 2d 227 (5th Cir. 1970).

10. The debts of Parkhill INC are the debts of Parkhill LTD and Parkhill CONSTRUCTION as well, since recognition of distinct entities would result in a gross injustice to the Government. *Steven* v. *Roscoe Turner Aeronautical Corp., supra.*

C. *Retainage.*

11. Those claims against the Retainage which arose from the Subject Contract and which have been proved in specific amounts should be paid in full. 484 F. 2d at 705.

12. No claim which did not arise from the Subject Contract can be the basis for a claimant's sharing in the Retainage. *Id.*

13. The claim by the Central Laborers Pension Fund for attorney's fees is not properly allowable. *Id.*

14. The Retainage should be distributed in the following manner:

A.	Wolf Battery and Electric Service, Inc.	$ 977.79
B.	Wolf-Jacobsen, Inc.	759.80
C.	Central Laborers Pension Fund	23,616.00
D.	Albert Equipment Company, Inc.	25,304.14
E.	Service Parts Supply Co.	2,001.42
F.	Standard Service and Supply Co.	9,404.71
G.	United States of America	Balance of Retainage

D. *Sale Proceeds*

15. The Government is the sole party entitled to share in the Sale Proceeds, and its rights arise from the tax liability of Parkhill INC.

16. Parkhill LTD and Parkhill CONSTRUCTION are not entitled to any of the Sale Proceeds, because they are treated as one legal entity along with Parkhill INC.

17. The Central Laborers Pension Fund is not entitled to any of the Sale Proceeds because its claim has been satisfied from the Retainage.

18. Claude Bailey is not entitled to any of the Sale Proceeds because he has never filed an answer to the third party complaint against him, nor has he otherwise claimed a part of this fund.

RECOMMENDATIONS.

1. Judgment should be granted the Government in accordance with Conclusion of Law 8 above.

2. The Retainage should be distributed in accordance with Conclusion of Law 14 above.

3. The Sale Proceeds should be paid to the Government.

4. A deficiency judgment should be granted the Government in the appropriate amount against the three Parkhill companies jointly and severally.

Respectfully submitted,

/s/ BRUCE W. BLACK
Bruce W. Black